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COMMENTARIES

ON THE

LAW OF SCOTLAND,

RESPECTING

TRIAL

FOR

CRIMES.

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BY

DAVID HUME, Esq. Advocate,

PROFESSOR OF THE LAW OF SCOTLAND IN THE UNIVERSITY OF EDINBURGH.

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CRIMES

AND

PUNISHMENT

OF THE

LAW OF SCOTLAND

BY

DAVID HUME, ADVOCATE.



COMMENTARIES

ON THE

LAW OF SCOTLAND,

RESPECTING THE

FORM AND ORDER OF TRIAL

FOR

CRIMES.

CHAPTER IX.

OF THE CALLING OF THE DIET; AND OF FUGITATION; AND OF DESERTION OF THE DIET.

CHAP. IX.

WE have now attended to what ſeems moſt material concerning the citation of the pannel; and are to follow the accuſation in the next ſtep of its progreſs, which is the calling of the libel in preſence of the Court. This, of courſe, cannot happen in the ordinary caſe, till the day of compearance, or *diet* as we call it, arrive, to which the pannel has been ſummoned; and indeed it may well be queſtioned, whether the day of trial could properly be anticipated, with the conſent even of the pannel, and that of the aſſize and witneſſes, and all concerned. The only thing I have met with in the Books of Adjournal, which has any reſemblance of ſuch a prepoſterous courſe of proceſs, is in

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the trial of Colonel Robert Monro and others, in 1722. In that caſe, ſome of the pannels were in Scotland, and had been ſummoned to the 26th of February; others had been out of Scotland, and were ſummoned on the long *inducia*, to a more diſtant day. Theſe laſt having however returned home, and having appeared at the bar on the 26th of February, along with the former, and deſired that the trial ſhould proceed immediately as to them alſo; this, in purſuance of the Lord Advocate's conſent, was allowed. But here there was a proper depending proceſs in Court, in which the compearance of additional parties might naturally be received.

Diet of the libel is peremptory.

See Mackenzie's Obſ. on Statutes, p. 74.

ON the other ſide, it is a point of ancient and invariable cuſtom, that the diet of a criminal proceſs is a peremptory diet, and not like that of a ſummons in civil matters, which bears continuation of days, and may be brought, therefore, earlier or later into Court, at the pleaſure of the party. That is to ſay; unleſs the libel be expreſsly continued by an act of Court on the day of compearance, it muſt be called on that day, and in ſome way or other diſpoſed of; otherwiſe the particular action, or *inſtance* as we call it, periſhes, and can never afterwards be ſtirred or reſumed. This, I ſay, is the conſequence, unleſs the diet be continued to another day by act of Court. But ſo it may be, by an entry in the Book of Adjournal, made in the preſence of one Judge only, and in the abſence, and without calling of the parties; and which act is not ſigned even by the Judge, but is the operation of the clerk of Court under his eye, and with his tacit authority.

Diet of the libel is peremptory.

THE reaſon of this ſtricter rule, obſerved in the practice of our criminal courts, lies in the nature of the proceſs there; which cannot be carried on like a civil action, by the intervention

vention of others, but requires the perſonal preſence of the accuſed, who is entitled to ſome conſideration of his anxiety and diſtreſs: Not to mention the attendance of the witneſſes and perſons of aſſize, which cannot be prolonged indefinitely, out of indulgence to the proſecutor, who ought to be finally reſolved before he ſtir in a matter of ſuch importance. Whatever, therefore, be the cauſe why the libel is not called and continued on the proper day, whether the neglect of the proſecutor in failing to report his letters duly executed, or a miſtake of the clerk of Court, or ſome accident which hinders the Judges from meeting; ſtill the ſame conſequence follows, in the loſs of that particular proceſs. Nay, if the meſſenger employed to execute the letters ſhall connive even with the pannel, and purpoſely delay to ſummon him; even this misfortune ſhall not warrant the proſecutor in an application to the Lords to continue the diet of his libel: becauſe the letters are not in Court at all, till they be returned with an execution, and they cannot therefore be the ſubject of any order whatſoever. Accordingly, ſuch a complaint having been made on the part of James Steel, purſuer, the Lords refuſed the prayer of his petition, and ordained him to paſs new letters as accords. Much more then muſt the proſecutor ſubmit to the delay, where the diſappointment is owing only to his own miſtake, in taking out his letters to too near a day; as in the caſe of William Chalmers, who accordingly obtained a warrant for new letters, "conſidering that the former letters are not at all executed."

Aug. 1. 1666.

Nov. 12. 1711.

Diet of the libel is peremptory.

IT would not, however, be fit that the proſecutor ſhould be diſappointed even in more extraordinary ſituations, and owing to no fault nor neglect of his own, nor of any other perſon; as in the caſe of a public faſt, thankſgiving, or

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other national ſolemnity, which hinders the ſitting of courts of juſtice. It is true, that even here, the law does not itſelf continue the diet of the libel to the next proper day of meeting; but this may be done by the act of any one Judge on the day of compearance, and without the aparatus of a Court, and in abſence of all concerned, either proſecutors or parties accuſed. The diets were continued accordingly, on the 7th of June 1665, which was a day of thankſgiving for the naval ſucceſſes in the war with the Dutch. Of courſe, however, the proſecutor cannot look for the ſame relief, in the caſe of thoſe ſtated and regular feſtivals of which he might and ought to have been aware. Regularly, too, no continuation can in any caſe be granted before the diet of compearance; becauſe then, and no ſooner, the libel comes to be in Court. For this, among other reaſons, the Lords refuſed the petition of James Macrae, praying beforehand, for a delay of his trial.

July 10. and 12. 1790.

What, if at the diet, the letters are not returned executed.

If, at the proper diet of the letters, the proſecutor has not even returned them executed into the hands of the clerk of Court, he in that caſe, if he be a private party, ſuffers another penalty in ſtrict law, beſide the loſs of that particular libel. In terms of the ſtatute 1535, c. 35., which complains of the great abuſe of juſtice, and waſte of expences, occaſioned by the frequent iſſuing and withdrawing of criminal letters, the clerk of Juſticiary and his deputes, are obliged "to take "ſicker ſovertie of the parties purchaſers of ſic letters, that "they ſall bring the ſamin againe to them, or the day ſet "thereto, dewlie execute and indorſate, under the paines "conteined in the letters, that the parties called upon [1]."

Theſe

[1] "On the 12th October 1677, John Mitchell being unable to find caution to "report the letters, and ſwearing to that effect, is allowed letters on his own "enactment to report them."

Theſe cuſtomary penalties, whatſoever they were, having proved inſufficient in the courſe of time, they were therefore heightened by the ſtatute 1593, c. 170.; whereof the pains continued in the time of Sir George Mackenzie, and ſtill do continue, to be called the pains of the *new* act of Parliament. They are various, according to the rank of the party, as he is a nobleman, a great baron, a freeholder, a feuar, a yeoman, or an unlanded gentleman: But whether the Legiſlature had a view herein to the rank of the proſecutor, which ſeems the more natural rule, or to that of the pannel, the ſtatute has not ſpecified; though Mackenzie ſays, that judgment was once given for regarding in this particular, the condition of the pannel, and not of the raiſer of the letters. In ſtrictneſs, therefore, and unleſs, on good cauſe ſhown for it, the Court ſhall think proper to relieve them, the proſecutor and his ſurety failing to report the letters duly executed, forfeit their bond of caution, and are liable in payment of the ſum conditioned therein.

Obſ. on Statutes, p. 278.

In an intermediate ſtatute to thoſe above mentioned, the act 1579, c. 78., a complaint is made "of ſindrie perſons "that outher in their awin names, or be the King's Advocate "upon their information, raiſis criminal letters and ſummondis "aſſizes, from the far partes of this realme, and ofttimes uſis "to paſſe frae the perſute of the letteris at the bar." Therefore the ſtatute orders, that for the future, ſecurity ſhall be taken of the purſuers not only for the "againe bringing of the letters "deulie execute and indorſate," but alſo "that the raiſeris there-"of ſall purſew the ſamin letters at the day appoynted, under "the paine conteined in the acts of Parliament." The faſhion

ſtill

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ſtill continues of taking the purſuer's bond of caution to that effect [1].

Let us now inquire concerning the proceedings that enſue in the different ſituations which may occur at the calling of the libel.

What, if both parties are abſent at calling.

1. It may happen that the parties are abſent on both ſides, neither the proſecutor appearing to inſiſt on his charge, nor the accuſed to underlie the law. In this caſe, the ſurety for the proſecutor ſuffers, in ſtrictneſs, the forfeiture of his bond of caution; though for many years it has not been ſo common as formerly to enforce this penalty *ex officio judicis* [2], if the proceſs has been ſettled by private agreement of the parties. On the other part, at leaſt if I may truſt the authority of Mackenzie [3], and the courſe of ancient practice, the accuſed, if he has found caution for his appearance, but in that caſe only, is liable to ſentence of outlawry, as well as his cautioner is liable to pay the penalty of his bond. According to this view, the outlawry in ſuch a caſe is not to be regarded as a meaſure taken in proſecution

[1] He finds caution, "that he ſhall report the criminal letters at his inſtance, "againſt, &c. duly executed, *and inſiſt in the purſuit thereof.*"

[2] In the caſe of Sir Alexander Rigby againſt Iſaakſon, Forreſt, &c. (Nov. 6. 1710), the purſuer not appearing, his bond of caution was found to be forfeited, the pannel being preſent.

[3] "And if both purſuer and defender be abſent, the purſuer's cautioner is un-"lawed for not reporting the criminal letters, *and the defender is outlawed*, and "*his cautioners likewiſe unlawed* for not repreſenting him." Mackenzie, Part 2. tit. 21. No. 7.

profecution of the crime libelled, (for the Court will not proceed to any ſuch unleſs the proſecutor be preſent and inſiſting for it), but as an act of the Court's own, grounded in the engagement of the pannel's bail-bond, and his contemptuous failure to perform his duty to his Sovereign, as there promiſed and conditioned. Certain it is, that there are many inſtances in former times, of outlawry paſſing againſt the accuſed in ſuch circumſtances, while the accuſer and his ſurety are unlawed withal, for not inſiſting in the proſecution. For inſtance, on the libel raiſed by Sinclair of Southdun againſt Laurence Caddel and others (February 1. 1666); in the caſe of the kinſmen of James Chriſtie, againſt John, James, and Andrew Neils; and in the caſe of Thomas Falconer againſt Robert Todrig. I do not obſerve, however, that the like has been done in any inſtance of a modern date.

June 5. 1666.

June 1. 1669.

2. LET us next ſtate the caſe, that the pannel attends at the calling of the letters[1], but that no one appears to inſiſt againſt him or ſupport them, nor yet any procurator for the complainer, to offer an excuſe for his abſence. The Judge in that caſe may find his bond of caution forfeited, and deſert the diet, and diſmiſs the pannel from the bar; whereby the inſtance equally periſhes, as if the letters had not been reported to the clerk of Court.

What, if the pannel is preſent, and the purſuer abſent.

IT

[1] It is only on his appearance that the accuſed comes properly to fall under the appellation of *pannel*, which, and not *priſoner*, nor *defender*, is his proper ſtyle and appellation in our practice. It appears, that at one time, a diſpoſition had ſhown itſelf at the Bar, to introduce the ſtyle of *defender*; but this innovation was repreſſed by an Act of Adjournal of the 18th November 1695, which orders that in all pleadings and debates, the *pannel* ſhall be ſo ſtyled, and ſhall not be called *defender*.

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It is, however, only the inſtance or particular action that is loſt in theſe circumſtances [1], and not the right of proſecution; which may ſtill be uſed in the raiſing of a new proceſs on the ſame grounds, and to the ſame effect, as the former. Thus in the caſe of George Bannerman, the diet having been deſerted on account of the abſence of the proſecutors, namely Richard Wood and others; and they having afterwards given in a bill, wherein they ſet forth, that their abſence was owing only to their ignorance of the law, and pray therefore to be reponed againſt that proceeding: "The Court refuſe the deſire of the bill as to the interlocutor deſerting the diet of the proceſs at their inſtance, "againſt the ſaid George Bannerman, reſerving to them to "raiſe new proceſs againſt him as accords." Yet, in the older practice, (and in itſelf the thing ſeems to be right), it was not unuſual in caſes of this deſcription, that the Lords enjoined the clerk of Court not to iſſue new letters to ſuch negligent proſecutor, without a new and ſpecial warrant from the Lords "*in præſentia.*" And herein, as I take it, they meant to aſſert a diſcretionary power of refuſing the ſecond letters, if the proſecutor's conduct ſhould appear to be vexatious; or at leaſt a power of taxing the new proceſs with ſuch conditions as might ſeem to be reaſonable in the caſe; the payment perhaps of the charges already incurred by the pannel, witneſſes, and aſſize. On the petition of Sinclair of Barrack, and others, ſetting forth, that the libel againſt him had been deſerted, and that a new proceſs was in agitation, the "Lords accordingly, &c. ordaine the purſuer or informer "of

July 4. and 11. 1709.

Nov. 28. 1699.

[1] The acts 1535, c. 35., and, 1593, c. 170., imply the competency of a ſecond proceſs, when the purſuer is abſent at the firſt; for, otherwiſe, there was no need of thoſe acts.

" of his Majeſty's Advocate to pay the bygone expences of " the former proceſs into the clerk, before he give forth new " letters, which expences is to be taxed by their Lordſhips."

Proſecutor muſt be perſonally preſent.

In this place the ſtudent ſhould be informed, that it is not ſufficient for ſatisfying the law here, as it is in a civil proceſs, that the proſecutor appears and inſiſts in the action by his counſel, who carries on the proceedings for him, and in his name. On the contrary, by ancient and invariable practice, he muſt attend his ſuit in perſon; and not only at calling the libel, but at all after periods of the action, no proceeding can take place in it, unleſs he be ſtill preſent to ſupport and urge on the *inſtance*, which is only in Court by his act, and extinguiſhes as ſoon his perſon is withdrawn. In truth, this is a proper rule for more reaſons than one. Becauſe the proſecutor's attendance is a fit mark of deference to the Court, who have no ſtated ſittings, like the civil judicatures, but are met at a ſpecial diet on his particular buſineſs, and in conſequence of his deſire: Becauſe the pannel may inſiſt for the proſecutor's oath of calumny in the entrance of the trial: Becauſe his preſence may tend to reſtrain him, in ſome meaſure, within the due bounds, in the manner of conducting his proſecution: And becauſe, in caſe the pannel be acquitted, and obtain decree for expences or *ſolatium*, he may have right to the beſt ſecurity for theſe, by immediate confinement of the proſecutor's perſon.

Lords may excuſe proſecutor's abſence.

But although it is certain, that the proceſs cannot advance in the proſecutor's abſence; it does not however follow, that this circumſtance, which may be owing to unavoidable accident, or ignorance of the law, is a neceſſary cauſe in every inſtance, why the diet of the libel muſt ſtraightway, and

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without farther inquiry on the ſubject, be deſerted. If a procurator appear for him, and offer ſome reaſonable excuſe for his abſence; or if, in the whole circumſtances of the caſe, it be preſumable that he has no purpoſe of abandoning the proceſs; certainly it is in the diſcretion of the Court to continue inſtead of deſerting the diet, and put the matter to the trial of a farther day. Thus, in the caſe of John Monteith and John Wright, the Juſtice refuſes to unlaw the purſuer abſent, and his cautioner, for not compearing to inſiſt, in reſpect Alexander Livingſton, writer in Edinburgh, compears as procurator for them, and produces a ſubſcribed procuratory; which the Juſtice-depute ſuſtains as ſufficient, and continues the diet to the 6th of June. In like manner, in the caſe of Duncan Gordon and others, "the Lords find that the procuratorie "was unwarrantably filled up, and therefore they doe repell "the procuratorie, but declaire that if it can be made appeir "be famous witneſs that Alexander Gordon and Donald Mac-"kenzie did fall ſick, and did become unable to travel, they "will excuſe their abſence." In the mean time, for want of ſuch evidence, and for other reaſons, they deſert the diet of the libel.

Mar. 13. 1662.

June 11. 1677.

Dec. 18. 1727.

AGAIN; in the caſe of David Couhoun and William Buntine, the deliverance is thus: The Lords, in regard that John Campbell and John Ewing "were not preſent in "Court to inſiſt in this proſecution, and no certificate or le-"gal evidence of their being unable by ſickneſs or otherwiſe "to travel, they the ſaid Lords did therefore deſert the diet, "in ſo far as concerned the reparation of damages and pri-"vate injury done to the ſaids John Campbell and John "Ewing," &c. In the caſe of Lockhart of Lee, againſt Rebecca Gillies, &c. at the diet for adviſing the informations, the pannels craved *abſolvitor* in reſpect of the abſence of the proſecutor,

July 5. 1751.

proſecutor, for whoſe oath of calumny, as they ſaid, they now meant to inſiſt. But Lockhart's counſel having anſwered for him, that he would appear and depone on any day which might be aſſigned him for that purpoſe, and that he was only abſent at this time, becauſe he knew not that the caſe was ſet down to be adviſed; the Court declined to comply with the pannel's motion, and continued the diet over to another day. More expreſsly ſtill, the ſame rule is laid down in the caſe of Smith, Hamilton, and Chriſtie, where the pannels craved to have the diet deſerted *ſimpliciter*, in reſpect of the proſecutor's abſence at the calling of his libel. Whereupon the Lords "find that in all proſecutions before this "Court, whether by indictment or criminal letters, the pro- "ſecutor muſt be preſent at all diets of Court, unleſs upon "ſpecial cauſe ſhown, he is excuſed by the Court, and the diet "continued to another day; but find the proſecutor's ab- "ſence at the firſt diet of this trial is no ſufficient cauſe for "deſerting the diet." In ſhort, the juſt doctrine on this ſubject ſeems to be, that although the trial cannot advance, nor any ſtep be taken on the libel, unleſs the proſecutor be in Court; yet his abſence is not a reaſon for ſtraightway diſmiſſing his proceſs, if he appear not to be abſent wilfully or without excuſe.

Jan. 26. 1778.

I NEED hardly obſerve, with reſpect to the Lord Advocate, that, by reaſon of his office, he enjoys the peculiar privilege of appearing by his deputies, who having his commiſſion communicated to them, are accounted in law the ſame perſon as himſelf. For the like reaſon, any criminal proceſs raiſed at inſtance of this officer, may be inſiſted in by his ſucceſſor in that ſtation. I find, for inſtance, that on the 12th January 1784, criminal letters which had been raiſed againſt John Grant, for perjury, at inſtance of the Honourable Henry

Lord Advocate appears by his deputes.

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Erſkine, Lord Advocate at the time, were taken up and inſiſted in by Ilay Campbell, his ſucceſſor. Moreover, on occaſion of a vacancy of this ſtation, it is competent for his Majeſty, by a ſpecial mandate or letter, thus far to beſtow the powers of the office on any one, that he may inſiſt in the proſecutions already depending in Court, or even raiſe ſuch new ones, as would fall under the commiſſion of the Lord Advocate, if he were appointed. The Queen's Solicitors were authoriſed by a letter to that effect, on the 6th July 1713, in conſequence of the death of the Lord Advocate, Sir James Steuart.

Muſt a corporation attend perſonally.

But how ſhall this matter be arranged in the caſe of a proſecution at inſtance of a body corporate, or other numerous aſſociation of perſons, of whom it cannot be expected that all their members, or even all their repreſentatives and office-bearers, are to attend on ſuch occaſions? The regular courſe, in ſuch a caſe appears to be, that the proceſs ſhall be raiſed, not in name of the company or corporation only, but alſo of a ſpecial factor or attorney, duly furniſhed with a commiſſion to that effect; and whoſe preſence will, from the neceſſity of the ſituation, be accepted as a ſufficient compliance with the law. This expedient was uſed, and found to be effectual, in the caſe of Thomas Mathie, who was proſecuted at inſtance of the York-buildings Company, and of Mr Henry Streachey, their factor, ſpecially empowered for that purpoſe, who attended in their room [1].

Mar. 10. and 20. 1727.

Again;

[1] The libel in this caſe was raiſed in the name of certain perſons, named and deſcribed as the Governor and Directors of the Company of Undertakers for raiſing the Thames water in York-buildings, for themſelves, and in name and behalf

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What, if ſome of the proſecutors are abſent.

AGAIN; the caſe may ſometimes happen, of a proſecution at inſtance of ſeveral complainers, of whom ſome are abſent, and others compear to inſiſt. Now what ſhall be done in this ſituation? Muſt the diet be deſerted; or ſhall the trial proceed at the inſtance of thoſe who are attending? Mackenzie hath ſaid, and I think juſtly, that in the caſe of the ſeveral intereſts being diſtinct, the abſence of one or more of the complainers can be no hinderance to another, who has a ſufficient title to proſecute, of himſelf; and he diſſents from ſome judgment, (whereof he has not, however, given the date, nor any other mark), in which, as he reports it, the contrary had been found. The caſe to which he alludes, is probably that of Donald Mackenzie and others, againſt Duncan Gordon and others, where the libel was at inſtance of three perſons, for the ſlaughter of their three brothers, and where this interlocutor was delivered, in reſpect of the abſence of two of the purſuers: "And in reſpect that ſeveral perſewars do libel for ſeveral intereſtis in each of the defuncts, whereby the pannalls entering to the knowledge of ane aſſize at one of their inſtance, cannot, be ane verdict, be free of ane perſute at the inſtance of any other of the perſewars, they deſert the diet, and allow each of the perſewars letters for the murder and ſlaughter alledged committed upon his relation." It does not appear from the record, that this meaſure was objected to on the part of the

Part 2. tit. 21. No. 6.

June 11. 1677.

behalf of the ſaid Company, and Mr Henry Streachey, their factor, and as having ſpecial power and warrant for that effect, conform to his warrant and commiſſion, lying in our clerk of Juſticiary's hands. Mr Streachey produced as his authority, not only his general commiſſion of factory, but an extract from the Company's books, and under the hand of their ſecretary, of a ſpecial order to him, to carry on this proceſs; and alſo, (but this bore date after the libel), a formal mandate to purſue, under the ſeal of the Company.

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the profecutor who appeared; and I think it may be queftioned, whether the Court, in this inftance, intended to deliver a rule on the fubject, or to make a fuitable arrangement only for the particular cafe.

What, if fome of the profecutors withdraw.

HOWEVER this may be, it feems to be clear, that if letters are raifed *at inftance* both of the Lord Advocate and an individual; either of them may be abfent, or may even formally withdraw from Court and difclaim the proceſs, without invalidating the title of the other. Nay, as mentioned formerly, in treating of the title to profecute, fo the Court found in the cafe of Colonel Charteris, where the accufation was at inftance of a private party, with concourfe only of the Lord Advocate [1], and where this concourfe was withdrawn after the calling of the libel. But if in fuch a cafe of profecution, with his Lordfhip's concourfe only, the private party fhall be abfent, or fhall withdraw his inftance, it rather appears to be the neceffary conſequence, that the libel entirely falls: becauſe in truth the Lord Advocate is not profecutor here, and the pannel cannot be detained in Court, at the fuit of one who called him not thither. Yet it is certain, that on one occafion, and after full debate too, this very plea was overruled, and the Lord Advocate allowed to infift *ad vindictam publicam*, for certain acts of battery and invafion, on a libel which he had only concurred in raifing at the inftance of Campbell and Ewing, the two perfons aſſaulted, who did not themfelves compear at the diet, to infift in the profecution. This was in the cafe of David Couhoun and William Buntine; December 18. and 26. 1727. The Lords, in regard that John Campbell

Mar. 27. Apr. 4. 1723.

See vol. i. p. 263. notes.

1 "The Lords, &c. fuſtain proceſs, and repel what is objected to the compe-"tency."

Campbell and John Ewing " were not present in Court to in-
" fist in this prosecution, and no certificate or legal evidence
" of their being unable by sickness or otherwise to travel; they
" the said Lords did therefore desert the diet, in so far as con-
" cerned the reparation of damages and private injury done
" to the saids John Campbell and John Ewing from the facts
" libelled; *but allowed the prosecution of that part of the libel*
" *which concerned the said John Campbell and John Ewing to be*
" *carried on at the instance of his Majesty's Advocate, ad vindictam*
" *publicam;* as also the other branch of the libel *at the in-*
" *stance* of Archibald Porterfield, one of the private com-
" plainers and present, *with concourse of his Majesty's Advocate,*
" in common form as accords."

What, if the accused is absent at calling the libel.

3. LET us now suppose, that the accused is absent at calling the libel, and that the prosecutor appears and insists. With one exception, which was introduced in evil times, in cases of treason, it has been our invariable custom, that in this situation no sort of proceeding can take place, as for trial of the crime related in the libel. It is considered on the one hand, that without the presence of the accused, there can be no security for doing full justice to his cause; for the pleading of his defences, the bringing forward of his proofs, the stating of all objections to the evidence on the other part, and still less for taking advantage of all those pleas and grounds of challenge, which may arise in the course of the proceedings in the trial. On the other hand, (though this is certainly an inferior consideration,) it is not suitable that judges should be called on to apply or declare the law, except in circumstances which afford the means of carrying their sentence into effect. For these reasons, the general and peremptory rule has long been

settled,

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ſettled, of requiring the perſonal preſence of the pannel in every ſtep, from firſt to laſt, of the trial, with exception only of continuations of the diet; ſo that if he even withdraw at the laſt ſtage of all, after a verdict of guilty has been returned againſt him, ſtill the Court, even in this caſe, cannot proceed to apply the ſentence of the law. This is exemplified in the caſe of James Macgregor, in 1752, who having made his eſcape from gaol, in the interval between his conviction and the day appointed for paſſing ſentence, had the diet continued againſt him from time to time, for a courſe of many months, and ſuffered no judgment in the end. And herein the Court proceeded on the ſame principle, as in the caſe of Charles Hay, where fugitation paſſed againſt Hay, as abſent at the diet named for returning the verdict of aſſize. Nay more, ſuch has been the influence of the general rule on this head, that even with regard to a meaſure which is for the benefit of the pannel, and puts an end to all his hazard from the proſecution, a doubt has been entertained of the competency of taking it in his abſence. In the caſe of Sir John Mackenzie and others, the purſuer, Mr John Dundas, having moved the Court to deſert the diet, their Lordſhips gave this deliverance: "In regard none of the pannels convened in "the ſaid libel were preſent at the bar; therefore, the ſaid "Lords refuſe to deſert the diet thereof; but continued the "ſame until the firſt Monday of March next to come, that "ſome of the pannels may then be preſent." At a later period, however, in the caſe of Major Allan Maclean and others [1], and on ſpecial cauſe ſhown for it, this latitude was

Maclaurin, No. 60.

Aug. 1. 1710.

Feb. 18. 1712.

June 18. 1763.

[1] "The Lords, &c. having conſidered the foregoing petition, *they diſpenſe* "with the perſonal preſence of the petitioners; and, in reſpect of the foregoing "conſent, deſert the diet againſt the petitioners *ſimpliciter*." The petition ſet forth, that they were neceſſarily abſent, and that on the public account.

was at laſt allowed. Yet ſtill, ſuch a meaſure is not even now to be regarded as an ordinary ſtep of proceſs, which may take place without a ſpecial diſpenſation, obtained from the Court, or which they will be diſpoſed to allow, except for urgent and extraordinary reaſons. Neither is it a matter of right, but of indulgence only, that the preſence of any one of the pannels, or of any number ſhort of the whole, is allowed to ſtand for that of the reſt. In the caſe of Innes of Dunkinty and others, Magiſtrates of Elgin, who were purſued for intruſion into a church, a petition was offered to the Court, ſetting forth the inconvenience of their attendance, both to the burgh and themſelves, and praying for a diſpenſation to appear by one of their number[1] only; which was given accordingly, under certain ſuitable proviſions.

Feb. 22. 1713.

Sentence of fugitation.

But although our cuſtom juſtly abſtains from taking any ſtep towards trial of any one in his abſence; it is however very neceſſary on the other hand, that we have ſome means of compelling to appear, or of driving out of the country, thoſe wicked and dangerous perſons who abſcond owing to conſciouſneſs of their guilt. Our expedient for this purpoſe is ſentence of fugitation or outlawry, which paſſes againſt the accuſed on his abſence at the diet of his libel, and in virtue whereof he incurs the forfeiture of his perſon in law, *(amittit legem terræ)*: ſo that he cannot bear teſtimony on any occaſion, nor hold any place of truſt, nor even purſue or defend

[1] "They allow any one of the magiſtrates to compear before their Lordſhips, "for the reſt of their number, upon the ſaids perſon's compearing his finding "ſufficient caution and ſoverty acted in the Book of Adjournal, to obtemper "and fulfil what ſentence ſhall be pronounced by the ſaid Lords againſt him, "and them, or either of them; and refuſe the petition, in ſo far as concerns the "within named James Ruſſell Beddell."

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in any, either civil or criminal[1] proceſs, nor claim any perſonal privilege or benefit whatſoever of the law. Farther, this ſentence is a warrant for denouncing him a rebel, or putting him to the horn, as it is called; whereby his moveable ſubſtance eſcheats to his Majeſty, and, in caſe of his remaining in this condition for a twelvemonth, the profits alſo of his heritable eſtate are forfeited to his ſuperior, for his lifetime. Theſe conſequences do not in anywiſe enſue, on a preſumption of the pannel being guilty becauſe he is abſent, for in that caſe the penalty would be various, according to the degree of the charge; but as a puniſhment of his contumacy, and rebellion (ſo it is conſtrued), in diſobeying the will of the King's letters, which order him to appear and underlie the law, on the charge which ſtands againſt him. In contemning this injunction, he is held to have caſt off his allegeance as a ſubject, and to have entered into a ſtate of rebellion to the law, and to the Sovereign of the land.

No plea againſt the libel can be uſed in abſence.

SUCH being the ground of this procedure; the accuſed cannot avoid it, by entering on the contents of the libel, through his advocate or procurator[2], and pointing out the flaws

[1] In the caſe of Patrick Dunbar, June 22. and 23. 1599, the Juſtice found no proceſs at inſtance of the private party, he being at the horn for ſlaughter: "The Juſtice finds nae proceſs againis the ſaid Patrick Dunbar, in reſpect of the "alledgeance verifyit." In the caſe of Lady Dun, (Nov. 22. 1714), who had objected that her huſband ſhould have been called along with her, the Lords "repelled the dilatory defence proponed for the pannel, in reſpect of the act of "fugitation produced, and criminal concluſion in the libel." This was an act of fugitation againſt her huſband.

[2] Neither have I found any inſtance of the ſuſtaining of an excuſe for abſence, as a hinderance to the paſſing of fugitation, unleſs it were neceſſary abſence abroad

flaws or irregularities of the charge. Be theſe ever ſo groſs and palpable, ſtill he is not the more excuſable, or rather he is leſs ſo, for failing to pay the due obedience to the Sovereign and his tribunals; and ſtill it is not proper that the Judge ſhould be occupied with the trial of his objections to the libel, unleſs he be there to anſwer the charge with his perſon, in caſe thoſe objections ſhall be overruled. Thus, in the caſe of James Farquharſon and others, purſued by Robert Stewart, meſſenger, for deforcement, the Court, at one and the ſame time, gave ſentence of fugitation againſt certain abſent pannels, and deſerted the libel as to James Farquharſon who compeared, in reſpect of its omitting to ſpecify the day of the deforcement. March 4. 1673.

But plea againſt the citations may be uſed in abſence.

One claſs of objections, however, there are, which the accuſed may plead by his counſel, in his abſence; namely all thoſe which relate to the ſufficiency of his citation. For he is not bound certainly to appear, unleſs he be called in the regular and lawful form; and indeed this is implied in the very ſtyle of the ſentence of fugitation, which proceeds againſt the accuſed, "as he who was lawfully cited to com-"pear," and failed to comply therein. It muſt therefore be competent for him to ſhow, that this narrative is not true, as applied to his caſe; and of this procedure ſeveral inſtances have occurred. In the caſe of Andrew Kennedy *alias*

broad, *reipublicæ causâ*, which was ſuſtained in the caſe of Major Macdougal, 6th March 1693. In the following caſe, where the pannel was ſerving in England, the objection was repelled. At calling the libel againſt Alexander Hay, 24th Nov. 1646, it was pleaded for him, that he was an enſign, and was abſent upon ſervice, *reipublicæ causâ*. Anſwered, That the fact was not verified, and at any rate, was not relevant. Replied, That it ſhall be verified *inſtanter*. The Juſtice repelled the allegeance.

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Weir, fugitation was allowed to paſs on the 29th July 1672, no objection having at that time been propoſed. But ſoon afterwards, counſel take inſtruments on his behalf, and ſet forth that the fugitation is null, in reſpect he has had allowance of thirteen only, and not of fifteen days *induciæ*, as by law required. Accordingly, in ſubſtance, the validity of this objection is acknowledged; for Kennedy is again fugitated on the 20th Auguſt, on a new libel for the ſame of-

June 30. 1727. fence. In the caſe of Walter Buchanan, as formerly mentioned, the Court refuſed to let fugitation paſs on account of an error in the citation at his dwelling-houſe; and here the proſecutor had maintained, that the objection could not be liſtened to, unleſs the pannel would appear in perſon, to

Dec. 13. 1736. ſupport it. Again; in the caſe of Archibald Macinliſter and others, this objection was ſuſtained for five of the pannels who were abſent, that their edictal citation was at the market-croſs of the head-burgh of Perthſhire, inſtead of another county.

Relaxation from fugitation.

But when the proſecutor has obtained ſentence of fugitation, muſt he be content with that ſatisfaction, and deſiſt from all farther meaſures for bringing the culprit to puniſhment of his crime? Certainly, this is not the law: On the contrary, the ſentence of fugitation is itſelf the ground of letters of caption, or a new warrant for taking and committing the outlaw; ſo as he may ſtill be brought to juſtice. Now, in the event of his being impriſoned, and again indicted; as he has no perſon in law at the time, under which to defend himſelf againſt the charge, but a perſon only to his own prejudice, for conviction and puniſhment; ſo it lies with him to apply to the Court for letters of relaxation, as they are called, whereby he may be reponed againſt the ſentence,

and

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and have this disability removed. In this request, however, unless the prosecutor shall consent to it, the Court are not obliged to listen to him, until such time as he stand accused on a new libel at the bar; for then, and no sooner, it becomes material to the doing of justice, that he be restored to the capacity of maintaining his defence. Thus, on the petition of Robert Macgregor, (Dec. 20. 1753), the Court think it necessary to assign their reasons for reponing him, "in respect "he is presently prisoner in the tolbooth of Edinburgh, and "may be tried for the murder alleged against him, and for "which he was fugitate in July 1736; *and that he is at present* "*under trial* for the hamesucken and other crimes, whereup-"on the other sentence of fugitation in May 1751 and de-"nunciation followed."

Another consequence of the outlaw's situation is, that he cannot insist, in the mean time, for the benefit of bail, though his commitment be for a bailable crime, nor for liberation on the act 1701, if his crime be capital; because, as an outlaw, he has forfeited all the privileges of a British subject, and especially these, which are among the highest and most valuable of any. Besides; the accused having already shown his disposition to avoid the justice of his country, is such a person with respect to whom the prosecutor is entitled to have the highest security for his underlying the law. And here I may take notice of a petition which stands in the record, at instance of Bernard Clunes, a prisoner in the gaol of Inverness. It relates, that he had applied to the Lord Justice-Clerk, to be liberated on bail, relative to the charge on which which he was in gaol at the time; and that his Lordship had modified the bail, and granted warrant of liberation, but this clogged with the condition of his being previously relaxed from

Dec. 15. 1733.

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from a ſentence of fugitation, which had paſſed againſt him on a charge of hameſucken, at inſtance of another party. For this purpoſe, he now again petitions the Court, and offers to find bail with regard to that accuſation alſo. The Lord Advocate anſwers, that no bail can be taken in ſuch a caſe; and the iſſue is, that the Court give a deliverance, but without mention of the particular reaſon, ordering the petitioner to be tranſmitted to Edinburgh, " in order to the ſaid " Bernard Clunes' ſpeedy trial." Again; in the ſaid caſe of Robert Macgregor, (20th Dec. 1753), the petition ſets forth, " That he did apply to their Lordſhips for having the effect " of a ſentence of fugitation and outlawry, pronounced a- " gainſt him in the year 1736 for the aforeſaid crime of " murder, removed, *ſo as he might be at liberty to force his trial* " *or liberation.*" And it concludes with praying, " it might " pleaſe their Lordſhips to repone him againſt the foreſaid " ſentence of fugitation pronounced in July 1736, *ſo as he* " *may force his trial or liberation for the crime which gave riſe* " *thereto*, and to grant warrant for letters for relaxing him " from the horn, to which he was denounced in virtue of the " other ſentence of fugitation, in May 1751, *ſo as he might* " *have* perſonam ſtandi, *and plead his relevant defences in the* " *courſe of his depending trial, and enjoy other benefits as his Ma-* " *jeſty's free liege.*" Another evidence to the ſame effect, is to be found in the order of proceeding in the caſe of Thomas Muir, advocate; who having been outlawed, and being afterwards taken and committed, firſt petitioned on the 10th of Auguſt 1793, to be reponed againſt the fugitation; and only after ſucceeding in that requeſt [1], by the conſent of the Lord Advocate,

[1] Though this appears to be the more regular courſe of proceeding, it has however often happened, that the prayer for letters of relaxation, and the offer of bail

Advocate, applied for the privilege of bail, on the 13th of the ſame month.

Relaxation from fugitation.

It may alſo happen, though it is not ſo frequent an occurrence, that the outlaw himſelf becomes deſirous of taking his trial, and of his own accord makes application to be reponed. In that caſe, it is neceſſary for him to appear in Court at moving his petition, and ſupport his application with the ſurrendry of his perſon; which alone can, in theſe circumſtances, be received as a proper earneſt of his ſincere ſubmiſſion to the law. Any motion made for him to that effect in his abſence, will ſtraightway be overruled. As happened on the petition of Patrick Duguid, which ſet forth that he was unable to find bail, and offered in lieu of it the ſecurity of a conveyance *omnium bonorum*, in favour of ſome perſon to be named by the Court. Not having ſucceeded in this courſe, he next made offer of ſurrendry and bail; which, after ſome diſcuſſion, was admitted on certain terms.

See, Aug. 6. 1762, Ronald Macgrigor.

July 17. 1749.

Feb. 7. 1750.

Power of refuſing or burdening relaxation.

This of finding bail, is not the only condition with which the Court may juſtly qualify their deliverance, reponing againſt ſentence of fugitation; nor is it by any means to be underſtood, that the reverſal of outlawry is a matter of right, wherein the Court have no diſcretion to grant or refuſe, but are under the neceſſity of complying, at the deſire of every one who ſhall apply for it. On the contrary, it is fit they be truſted with a power of doing on ſuch occaſions, as the caſe requires: Since otherwiſe, after the means of

bail have been made in the ſame petition, and that the deliverance of Court has granted warrant for ſuch letters, under condition of finding bail; until which time the petitioner remains committed.

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of conviction have periſhed, by the death of witneſſes or other injury in the courſe of time, the greateſt and moſt notorious criminal might freely return into the ſociety of the inhabitants of this land; to the reproach of juſtice, the diſtreſs of the party injured or his relations, and the danger of new offences. Although, therefore, it ordinarily happens, that ſuch applications are ſucceſsful, no objection being made to them; yet it is certain that the Court have a judgment in this matter, and may maintain the ſentence of outlawry, if they ſee ſufficient reaſons, why it is contrary to material juſtice to recall it. Much more, therefore, in reponing againſt the decree, muſt they have it in their power to qualify their deliverance with ſuch conditions as they think equitable in the particular caſe. Thus, Patrick Duguid was reponed on condition only of refunding all the coſts of the previous proceedings againſt him. In like manner, the Lords repone Munro of Culrain, and forbid the recording of the denunciation, on his paying L. 35 of coſts by a certain day; failing which, the regiſtration is ſtill to take place. So likewiſe, the payment of L. 200 Scots of expences, is annexed to the expeding of the letters of relaxation in the caſe of Burnet of Carlops. And on the 26th February 1700, after paſſing ſentence of fugitation againſt Andrew and William Munro, "the Lords, &c. diſcharge any bill of relaxation to "be offered for any of the defenders, till their Lordſhips "modify expences for the purſuer and witneſſes, to be conſign-"ed before paſſing." Again, I find this entry on the record of the 11th June 1677, ſubjoined to a ſentence of fugitation: "Lykeas the Lords Commiſſioners of Juſticiary upon ane "deſyre moved by the Lord Advocate, deſyring Inverey, "and the other pannel, declared fugitives, might not be re-"laxit, before they refoundit the purſuer's expences; the ſaid "Lords

Feb. 7. 1750.

March 8. 1739.

June 27. 1715.

" Lords ordained that no relaxation paſs for any of the fore-
" ſaid fugitives, in tyme of Seſſion, but in Court, and in tyme
" of vacation, but be a quorum, met together; at which
" tyme they will conſider the Lord Advocate's deſire in be-
" half of the purſuer's expences."

Does fugitation exhauſt the libel.

But here ariſes a queſtion, concerning the competency of trying the outlaw on the ſame libel which has already ſerved as the ground of his fugitation. That is to ſay, is the libel exhauſted in the paſſing of ſuch ſentence; or is it ſtill current and in Court, to that main purpoſe for which it was at firſt raiſed? That a libel which has been followed with fugitation is not ordinarily uſed for any ſuch purpoſe, is certain; as indeed it can but ſeldom be convenient, even if it be competent, to proceed in that courſe. But it may be argued, that the fugitation is no ſentence on the concluſions of the libel, no declaration of the guilt or innocence of the accuſed; but an incidental act only, calculated for compelling him to appear and take his trial, as appears from the ſummary manner in which it may be reverſed: That it is true, the libel has not been continued to any certain diet; but that it is not therefore neceſſarily out of Court, ſince neither was the proſecutor to blame, for failing to obtain ſuch continuation: And that if the pannel crave to be reponed *in ſtatu quo*, as if he had appeared in due time, he muſt equitably be held to bring the libel back into Court along with him, ſo as the proſecutor alſo may be in the ſame condition, as at the firſt diet of the proceſs. For my own part, however, I very much doubt, if this be a juſt view of the ſituation: eſpecially conſidering that the fugitation ſeems to be a warning to the witneſſes and aſſize, that there is no farther occaſion for their ſervice; and that their attend-

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ance cannot again be commanded without a new and formal citation to another day, for which there is no authority till a new libel be raiſed, the warrant in the firſt one being clearly exhauſted. Let me mention, however, that ſome things appear in the record, which, though I think they are not deciſive, ſeem to favour at leaſt of the competency of this unuſual ſort of proceſs. On the 14th July 1712, Finlay Macintyre offers a petition, praying to be reponed againſt his outlawry; in which requeſt he is indulged on payment of a certain ſum of coſts, and the diet of that ſame libel is continued till the next Friday. The ſentence here had not been followed with denunciation. On the ſame day, James Charles, and James Ruſſell, two of a number of pannels, all of whom but they had appeared, apply to the ſame effect; and they obtain, in like manner, a continuation of the diet of the libel, to the next Friday; at which time aſſizers and witneſſes and all concerned, are warned to attend. In the

March 1. 1714. like view, on the petition of David Cunningham, the Lords ſtop extract of his denunciation until a certain day [1], to which the libel had been continued againſt his aſſociates; meaning, as I underſtand, then to proceed in the trial of him

June 27. 1715. and the other pannels. Again; when Burnet of Carlops is reponed, the caution which he finds is not general, for his appearance on any day to which he might afterwards be cited in virtue of a new libel, but "on Monday the 18th July "next to come, to underlie the law for the crimes contained "in the libel raiſed againſt him." Laſt of all, in the order for

1 "They ſtop extracting or regiſtrating of the within denunciation until the "ſecond Monday of June next to come, being the day of compearance to which "the within criminal proceſs is, with conſent of the purſuers, continued againſt "the other pannels."

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June 12. 1738.

for reponing David Strang againſt his ſentence of fugitation, he is directed "to find caution that he ſhould anſwer to the "libel already raiſed againſt him," as well as to any other which might afterwards be raiſed. Theſe ſeveral proceedings are no doubt favourable, all of them, leſs or more, to the notion of the libel being ſtill in Court, notwithſtanding the act of fugitation. But it is to be noted reſpecting ſome of them, that the libel was kept in Court at any rate, by the appearance of other perſons accuſed therein; and it may juſtly be ſaid with reſpect to all of them, that they cannot be held deciſive of the point, as in none of theſe inſtances, nor, as far as I have obſerved, in any other, did a trial actually take place on the libel which had ſerved for fugitation.

Though both parties preſent, diet may be continued.

4. We will now at length ſuppoſe, that both parties are preſent at the calling of the diet. Though the proſecutor inſiſt on his libel, yet ſtill it is not neceſſary, for it is often impracticable, that the Court proceed to trial on that very day; nor is it in that ſenſe that the diet of a criminal libel is peremptory, but in this other, more reaſonable and convenient ſenſe, that one way or other the libel muſt be diſpoſed of on that day, and that it periſhes if not then taken notice of and continued. After calling, therefore, if for any reaſon of convenience to the Judges themſelves, or of juſtice either to the proſecutor or the pannel, it be found unſuitable to enter on the caſe immediately; the Court have the power of adjourning the trial to another day, which is ſpecified in their deliverance, and of which parties, witneſſes, and aſſizers are warned *apud acta*, that they may again attend. Certainly, however, it is always to be underſtood, that when the proſecutor occaſions any ſuch delay, or if it is granted for his convenience, he may ſo far be found liable in expences to

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the pannel. This was ordered in the trial of Robert Story [1], (12th Dec. 1748), where the profecutor ſought a continuation, on account of the abſence of certain witneſſes who were material to his cauſe.

WHATEVER the reaſon of the adjournal, the libel muſt be continued to a certain day; becauſe, for the ſame reaſons which require the firſt diet to be peremptory, no ſuch thing is known in the practice of the Court, as the continuation of a diet indefinitely, or *ſine die*. And hence, the Viſcount of Kenmure, pannel, having obtained a warrant from the Privy Council, diſcharging the Juſtice "to proceed any farther in the fore-"ſaid proceſs, till the Counſell's farder ordour;" the Juſtice, inſtead of continuing the diet indefinitely, in terms of the warrant, ſtraightway deſerted it entirely.

June 1. 1666.

Power of deſerting the diet.

IT is alſo a caſe which ſometimes happens, that, though ſtill reſolved on bringing the pannel to juſtice, the proſecutor ſees cauſe, however, not to inſiſt in the trial of him on that particular libel. Becauſe, perhaps, he has diſcovered ſome flaw in it, or the executions thereof; or on account of new and material evidence which has lately come to his knowledge, and which requires an addition to his liſt of witneſſes, or may occaſion a difference in the laying of his charge. In ſituations of this ſort, which, notwithſtanding all due pains on the proſecutor's part, muſt ſometimes happen, it is neceſſary to the advancement of juſtice, that he have the power of deſerting his preſent libel, without prejudice to his

[1] "But found the private party purſuer, liable to the pannel in what addi-"tional expence he ſhall be put to by the continuation of this diet, and allowed "the pannel to give in an account thereof to be taxed by the Court."

his right of inſiſting anew, at the time, and in the form, which he ſhall find adviſable. If indeed he had the abſolute and uncontrolled privilege of throwing up his proceſs as often, and for what cauſes ſoever he pleaſed; this would be dangerous to the pannel, who might thus, under falſe or affected pretences, be haraſſed with repeated libels. Our cuſtom does not therefore truſt the proſecutor to that extent, but allows him only to move the Court, to deſert the diet *pro loco et tempore*; in which requeſt they may refuſe to gratify him, if they ſee cauſe to believe that he intends any thing oppreſſive or improper, or if they are not ſatisfied that there are good reaſons for ſuch an indulgence. It is true, the ſtyle has crept into practice, of the *proſecutor* deſerting the diet; becauſe it ſo often happens that his motion for ſuch a purpoſe is ſucceſsful. But in truth this is a looſe and inaccurate expreſſion: For the act of deſertion is not his act, but that of the Court; without whoſe permiſſion and deliverance the proceſs cannot be withdrawn in this temporary form. And, indeed, if he be a private proſecutor, the Court have already caution from him to inſiſt on that libel; and to this they may hold him, and refuſe to give him new letters, if they ſee cauſe. Accordingly, in the debate on the caſe of Archibald, the proſecutor frankly diſowns all pretenſions to any ſuch arbitrary power. His Majeſty's Solicitor repreſents, "That he obſerves in the information, on the part of the pannel, very "alarming conſequences are endeavoured to be grafted on "the doctrine pled in behalf of the proſecutor in this caſe; "as if it gave to the public proſecutor a very arbitrary power "of oppreſſing the ſubjects in this country, by deſerting "diets as often as his fancy ſuggeſted: but as all the alarm-"ing conſequences pointed out are founded upon the ſuppo-

March 1. 1768.

"ſition

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" ſition of a doctrine which he never meant to plead, he thinks
" it now proper to have this matter clearly underſtood; as
" the public proſecutor never pleaded, nor does he deſire it
" to be believed by the ſubjects in this country, that he has
" any arbitrary power of deſerting diets without the authori-
" ty and intervention of Court: which circumſtance totally
" removes all thoſe apprehenſions, which the counſel for the
" pannel has grafted upon the ſuppoſition, that an arbitrary
" power of deſerting diets was claimed in this, or in any o-
" ther caſe, by the public proſecutor."

On the other hand, if the proſecutor be preſent and inſiſting on his libel, as little have the Court any power of throwing it out of Court againſt his will; except in the form of a judgment finding it irrelevant, or ſuſtaining a lawful objection to it, of one ſort or another. They may continue the diet from day to day, till the convenient ſeaſon arrive for their proceeding in the trial; but they cannot oblige the proſecutor to withdraw his libel, if he chooſe to have their judgment on it, ſuch as it is. Hence the entry, ſo frequent in the older records, though diſuſed of late years, " The Lords for ſeveral cauſes
" moving them, *with conſent of the ſaid purſuer*, deſerted, and
" by thir preſents deſerts, the ſaid diet *ſimpliciter*."

Deſertion *ſimpliciter* on the accuſer's motion.

A CASE of deſertion which is different from any of theſe, and is attended with more deciſive conſequences, is, when the diet is deſerted *ſimpliciter*, and this on the motion of the proſecutor himſelf, at calling his libel. If he crave to have the diet deſerted *pro loco et tempore* only, he expreſsly qualifies his motion, and acquaints both the Court and the pannel, that he paſſes from his action for the

the time only, and reſerves his right to inſiſt anew at ſome more convenient ſeaſon. Or, if the Court deſert the diet on account of objections that lie to the citations, or to the form or relevancy of the libel; this alſo, of its own nature, is a ſpecial judgment, relative only to that particular proceſs, and cannot hinder the raiſing of a new libel in better form, or which ſhall be executed with more attention. Thus, for inſtance, (if it is neceſſary to confirm ſo trite a doctrine with examples), the diet is deſerted *ſimpliciter* in the caſe of Walter Buchanan, on the 30th June 1727, on account of certain irregularities in the citation; and on the 18th December 1727, he is tried on a new libel for the ſame offence. Again, where the Court deſert the diet by reaſon of the proſecutor's abſence at calling his libel; even this, though it may ſometimes, is not however always, nor even ordinarily, a bar to a ſecond proceſs at his inſtance: becauſe it may be found that his abſence was neceſſary, or at leaſt excuſable; in which caſe he is not to be puniſhed with the forfeiture of his right of proſecution. But if the proſecutor, being preſent, ſhall himſelf move the Court to deſert the diet *ſimpliciter*[1]; wherein he neither alludes to any dilatory cauſe for dropping his preſent libel, nor intimates any purpoſe of raiſing a new one; ſuch a meaſure cannot be conſtrued any otherwiſe than as a relinquiſhment or diſcharge of his right, and equal to a judicial conſent on his part, to the paſſing of *abſolvitor* in favour of the pannel. This conſtruction was finally ſettled in the caſe of William Leſlie; where the diet having been deſerted Jan. 21. 1788.

[1] The diſtinction between this form of deſerting the diet, and a deſertion *pro loco et tempore*, was known as far back as the inſtitution of the preſent Court. See the caſe of John and William Meldrum, 7th Dec. 1674, "The purſuers declared that they paſſed from the pannels *pro loco et tempore*; in reſpect that," &c.

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ſerted *ſimpliciter* on the proſecutor's own motion, he was found to have put a bar [a] thereby in the way of all farther proceſs at his inſtance. In truth, judgment ſeems to have been given to the ſame effect long ago, in the caſe of John Leith and others, November 20. 1671.

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[a] "They ſuſtain the objection offered for the pannels, in bar of procedure; "and therefore diſmiſs the libel and pannels from the bar."

CHAPTER X.

OF PLEADING TO THE CHARGE, AND OF DEBATE AND INTERLOCUTOR ON THE RELEVANCY OF THE LIBEL.

CHAP. X.

Pannel has to anſwer only to one libel.

I. IF both parties are preſent at calling the diet, and both are willing to proceed, the libel ſhall then be read in open Court, and the preſiding Judge ſhall interrogate the pannel, concerning his guilt or innocence of the charge that is on record againſt him. But here, before I deſcribe the form in which the pannel enters his plea, it may be proper to obſerve, that no perſon can in any caſe be made to anſwer or take his trial, on more than one libel for the ſame offence. If, therefore, the pannel have been ſerved with more than one, whether different in ſubſtance, or in their liſts of witneſſes or aſſize, and if theſe be all in Court at the ſame diet; he is entitled to know, before he plead to any of them, or enter into his defence, which of them it is that the proſecutor now inſiſts on; and to have the diet deſerted with reſpect to all the others. It is true, the experiment was once made, and received the ſanction too of a judgment of the Court. This was in the caſe of Lindſay and Brock, where the pannel

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ſtood accuſed on two indictments, one of the 29th July, and the other of the 15th November 1717; whereof the latter was not ſo full in the liſt of witneſſes, as the former. The pannel objected, therefore, that this libel could not be uſed againſt him, as long as another was in Court for the ſame crime, undiſcuſſed, and not deſerted. The Lords found, "That his Majeſty's Solicitor is not under any neceſſity of "deſerting the diet of the firſt indictment againſt the pan-"nels, but that they may inſiſt in both at the ſame time." But this deciſion, which is the ſingle authority for ſo unuſual a proceeding [1], ſeems to be liable to ſerious objections. On the one hand, the proſecutor cannot ſay, that he is hardly dealt with in being put to make his choice among his ſeveral libels, whereof ſome one at leaſt ought to be correct, and executed in proper form. On the other hand, the pannel ſuffers a diſadvantage in conducting his defence, unleſs ſuch an election ſhall be made. For there may be blunders in the body of one of thoſe libels, or in the liſt of witneſſes, or in the manner of execution againſt the pannel or witneſſes, which may be more or leſs available to him, and may perhaps ſerve to his acquittal, if the proſecutor inſiſt excluſively on that one. Whereas, according to the latitude allowed in Lindſay's caſe, even after making good ſuch objections, the pannel in nowiſe profits by his ſucceſs therein, and is thus perplexed and encumbered with the care of a double ſet of pleas. I learn from a printed petition and anſwers,

Nov. 15. 1717.

[1] I muſt alſo except the caſe of William Lawrie of Blackwood, tried on the 31ſt January 1683, for reſetting and intercommuning with traitors. Againſt him there are three indictments recorded, all of the ſame date. But this caſe, is, in every point of view, unworthy of being quoted as of any authority in the law.

ſwers[1], (for they are not in the record), that in the caſe of Colonel Charteris, the pannel had been ſerved with no fewer than four libels, calling him to ſeveral diets, and otherwiſe differing one from another; and of this proceeding he complains, and inſiſts that the proſecutor ſhall ſpecify the dittay on which he intends to go to trial. The proſecutor does ſo accordingly, in his anſwers to the petition; and it appears from the informations in the caſe, that the Colonel never had to plead to any of thoſe libels but one, which alone appears in the record.

Jan. 29. 1723.

Libel cannot be amended at the bar.

As the proſecutor cannot reſerve to himſelf the freedom of inſiſting at once on a number of libels, ſo neither is he allowed to ſhift his ground, as is ſometimes done in civil caſes, by means of an alteration or amendment of his libel at the bar, unleſs with the permiſſion of the pannel. I obſerve, however, that in two inſtances ſome approach had been made towards a proceeding of that ſort. In the caſe of John Robertſon, which was a trial for houſebreaking and murder, certain farther preſumptions of the man's guilt had come to light after ſervice of his indictment; and theſe the proſecutor ſet forth in an additional indictment (as it is ſtyled in the record), which refers to the other, and relates the new facts, without any ſort of preamble, and with only this concluſion, "which was ſtill ane ground of preſumption of guilt againſt "him." The interlocutor of relevancy bears, that the Court proceeded on conſideration of the "principal and additional "libel or indictment." But, though it was certainly irregular that this eik to the libel was allowed to paſs into the record; yet the pannel could not well complain of it,

Mar. 24. and 25. 1708.

[1] Theſe are in the Author's poſſeſſion. One libel only appears in the record.

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who was warned in this way of the new circumſtances of preſumption, which the proſecutor, if he pleaſed, might have kept entirely to himſelf. The other inſtance was in the noted trial of Robert Carmichael, a ſchoolmaſter, for the murder of his pupil, the ſon of Douglas of Dornock. The proſecutor in this caſe, after his libel was in Court, though it was very long and articulate, thought proper to reſtrict and explain it, firſt with one writing, which he ſtyled a declaration, and afterwards with another, bearing that he was to inſiſt on his charge in ſuch and ſuch terms. The pannel excepted to theſe variations, as truly amounting to a new indictment; and the Court had probably been diſpoſed to liſten to him therein: For in the end, it was only in purſuance of a written conſent on his part, that the trial was allowed to proceed on the laſt of theſe declarations, as a libel. The ſtrict rule of proceeding, ſeems to have been more rigorouſly enforced in a caſe of a much older date. At calling the indictment againſt Janet Corſar, for the murder of a boy, by beating him ſo that he died, the proſecutor ſeems to have been diſpoſed to turn his libel into a charge of beating and wounding only, on which he might obtain a ſentence for ſome inferior correction. "The Lord Advocatt declares, "that he inſiſts upone this libel, *pro defuncto occiſo, ſaltem le-*
"*thaliter vulnerato vel contuſo; ad pœnam mortis, ſi inveniatur oc-*
"*ciſus; et ad pœnam vel mulctam extraordinariam, ſi tantùm inve-*
"*niatur contuſus, et non ex vulneribus, vel contuſionibus, deceſſiſſe.*"
But this the Court would not allow: "The Juſtice be inter-
"locutor declaires he will nocht admit my Lord Advocat
"his declaration *hoc loco*, and in this dittay; reſerveand to
"the partie perſewar to perſew *pro vulnerato et contuſo*, upone a
"new libel or dittay, and remittis this matter, *pro occiſo*, to
"the knowledge of an aſſize."

Jan. 1. 10. and 25. 1700.

Apr. 23. and 27. 1641.

BUT

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Form of pleading to the charge.

BUT to return from this digreſſion, and proceed with the courſe of interrogating the pannel on his guilt. If he have nothing to object to the execution of the libel, (for if he have, this is the proper ſeaſon for ſtating ſuch objection), he enters his plea of Guilty or Not guilty [1], which paſſes on the record; or, if he think it more adviſable, he may enter there, as was done in the caſe of Buchanan and Lilburn, in July 1771, a qualified confeſſion, or ſuch a narrative of the matter at large, as he chooſes to give. This indeed, ſeems in effect to have been an ordinary way of managing the matter, of old. For if the pannel meant to confeſs, and had emitted a declaration to that purpoſe, he, inſtead of pleading guilty on his trial, acknowledged and adhered to ſuch declaration [2] in preſence of the Court and aſſize, and again ſigned, or gave authority to ſign it for him. It may not, however, in every inſtance be ſafe for the proſecutor, (and this muſt be always at his option), to rely on this ſort of confeſſion: as may be ſeen in the aforeſaid caſe of Buchanan and Lilburn; where the aſſize found both pannels guilty in the preciſe terms of their own declarations, and yet, in the end, on account of an ambiguity in the expreſſions, the Court found it neceſſary to acquit both of the charge.

Maclaurin, No. 86.

IN

[1] The old form of entering a plea of not guilty was thus, "After reading of "which dittay, the pannel altogether denyit the ſamin to be of verity."

[2] See for inſtance the caſe of John Smith and others, Sept. 16. 1672; and July 27. 1674, the caſe of Francis Bell; alſo the caſe of Andrew Arnot and others, for their ſhare in the action at Pentland Hills, Dec. 5. 1666.

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Plea of guilty may be retracted.

In whichever form the pannel enter his plea of guilty, his confeſſion made to the Court is in nowiſe deciſive of the iſſue, as it is in the law of England, nor hinders him from being ſent to an aſſize; before whom, if he chooſe, he may retract ſuch confeſſion, and put himſelf on his trial. For, in our practice, the proof, of whatſoever kind, on which any one is to be convicted, muſt be taken in preſence of the aſſize; which is not true of a confeſſion made at this ſtage of the proceſs, before the perſons of aſſize have been named. It is true, the men may have been in Court when the confeſſion was made; but ſtill, as they were not neceſſarily preſent on that occaſion, nor had yet entered on the functions of their office, ſo the whole proceeding muſt be reckoned extrajudicial with reſpect to them. And indeed, ſo little do we regard the jurymen as veſted with that character, or as ſuſtaining any part in the proceſs at this time, that the proſecutor, if he pleaſe, may even deſert the diet of his libel after the culprit has pleaded guilty to the charge; a thing which is no longer in his power, when the aſſize have entered on their office. So it was judged in the caſe of Mutter, Bryſon, and Hog; where, on the confeſſion of Mutter, the Lord Advocate deſerted the diet as to him, and inſiſted againſt the other two, who were accordingly tried and convicted.

June 22. and July 6. 1730.

Import of the plea of not guilty.

It may not be amiſs to obſerve, that in pleading not guilty, the pannel is not always to be underſtood as denying in whole the facts which are ſtated in the libel. In a caſe of murder, he may plead *not guilty*, and in the ſame breath he may admit the fact of ſlaughter, but with the addition of ſome quality, ſuch as ſelf defence, or execution of duty, which makes the act inculpable; whereby, on the whole, and taken complexly,

ly, his plea is *not guilty* of the crime charged in the libel. It is true, that, after the example of Voet, and other foreign commentators, Mackenzie has propoſed the queſtion [1], whether in entering ſuch a plea, the pannel ſhall not be held to betake himſelf to that alone, and entirely to riſk the iſſue on the evidence he is to bring in ſupport of it, nay even ſo as to diſpenſe with any proof of the *corpus delicti* on the other part. But although, in former times, ſome ſuch doctrine ſeems often to have been preſſed on the Court, and eſpecially by Sir John Niſbet of Dirleton, while he was in the office of Lord Advocate; yet, in no inſtance, as far as I can find, was ſo unreaſonable a notion ever countenanced with a judgment. In particular, ſuch a plea ſeems to have been diſregarded in the trial of Andrew Rutherford, on the 9th Nov. 1674.

THE ſtudent ſhould here be informed, that where, beſide the general plea of *not guilty*, the pannel intends to maintain ſome ſpecial defence, he at this period of the proceſs, by himſelf or his counſel, has to open up the particulars of his caſe, and lay before the proſecutor and the Judge, the outline of the ſtory on his part. In the common caſe, this is what he will naturally be diſpoſed to do, on his own account. But even if he ſhould incline to be reſerved in that reſpect, in the hope perhaps of gaining ſome undue advantage; this is what the proſecutor is not obliged, and the Court will not be diſpoſed, to allow. Becauſe, for want of acquaintance with the plan of defence, the proſecutor may loſe ſome material part of his own evidence; not knowing how to interrogate his witneſſes, nor on what points chiefly to ſtrengthen or guard the proof in ſupport of his charge. Beſides, it is an

1. See Criminals, Part 2. tit. 22. No. 8.; tit. 24. No. 4.

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an indulgence to the pannel, and a departure from what is ordered by a ſtatute, and one too of a modern date, that he is permitted even to explain himſelf on his defences, at ſo late a period of the proceſs. The ſtatute of the 20th Geo. II., c. 43., No. 41., requires, that on the day before his trial, the pannel ſhall lodge with the clerk of Court, a written account, ſigned by himſelf or his counſel, of the facts which he alleges, and the heads of the objections or defences which he is to maintain. Now, if the proſecutor do not inſiſt on his right in this article, but be willing to proceed in the trial without delay, though no ſuch defences have been lodged; certainly he may qualify this conceſſion, and inſiſt on all reaſonable ſatisfaction in ſuch particulars, on the day itſelf of the trial.

I HAVE ſaid above, that the pannel has to make this explanation by himſelf, or his counſel. Which leads me to obſerve, that the benignity of our practice allows him the aſſiſtance of counſel in every inſtance; and will provide them for him, and compel them to ſerve, if he have not the means of engaging them for himſelf. This was ordered long ago, by the ſtatute 1587, c. 91., which ſays, " That all and whatſumever " lieges of this realme, accuſed of treaſon, or for quhatſumever crime, ſall have their advocates and procuratoures, to " uſe all the lauchful defences, quhom the Judge ſall compell to procure for them, in caſe of their refuſal; that the " ſute of the accuſer be not tane *pro confeſſo*, and the party accuſed prejudged in ony ſute, before he be convicted be " lauchful trial."

Form of debate on the relevancy.

HERE then, between the pannel ſtating his defences or objections, and the proſecutor obviating theſe, and maintaining his

his charge, there takes place the debate on the *relevancy*, as it is called, of the libel; which in the firſt inſtance is now always a debate *vivâ voce*. But in this article our practice has been different at different times. As far as can be gathered from the face of the record, the ancient cuſtom, and which continued to be obſerved till after the beginning of the 17th century, was for a ſpoken debate; whereof the clerk took down a minute, ſtating in his own words, and always very briefly, the heads of the ſeveral defences, without any detail of the arguments or authorities on either ſide. In the courſe of that century, this courſe was exchanged for the more cumberſome and tedious one of a written pleading, wherein the counſel on either part, in preſence of the Judge, dictated at large to the clerk of Court, in the form of defences, anſwers, replies, and ſo forth, all that occurred to them as proper to be ſaid on the caſe. This dry and tedious ſtyle of diſputation, which often drew out to a great length, was aboliſhed by the ſtatute 1695, c. 4., which ordered, that the relevancy ſhould be debated in the firſt inſtance, *vivâ voce;* and afterwards in written informations [1], which were to be entered on record, and publicly

[1] It was expreſsly declared by Act of Adjournal, Sept. 3. 1708, that this ſtatute was not intended to regulate trials upon the Circuits. Indeed it could not poſſibly be applied to them.

The law appears ſometimes to have been diſpenſed with even in caſes to which it properly applied. For example, ſeveral libels for child-murder, appear to have been ſuſtained on the 3d March 1709, againſt Beſſie Turnbull, Iſobel Taylor, Margaret Inglis, Janet Ferguſon, and Marion Burnet, without any debate or information on the relevancy at all. The like, in the caſe of James Macminn, for murder, Dec. 31. 1711; and in that of Alexander Neil for beſtiality, Jan. 18. 1714.

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licly read, at adviſing, to the Court; who, if they ſaw cauſe, might order parties to be heard *vivâ voce*, on any new topic that was advanced on either ſide [1]; of which ſecond pleading a minute was to be entered by the clerk. Under this ordinance, a debate on the relevancy *vivâ voce*, and next a debate in writing, became an ordinary, or rather a neceſſary part of every criminal proceſs, whether there were or were not any room for difference of opinion reſpecting the propriety or ſufficiency of the charge. And hence the great load of frivolous objection, and ſophiſtical argument, with which, after that period, the records are filled, in the ſhape of informations, on caſes where there could be little doubt of the proper judgment to be pronounced. At length, the ſtatute 20th Geo. II. c. 43., relieved our Judges from this tedious and unprofitable bondage; having ordered that the debate on the relevancy of the libel, if there be any thing to offer on that head, ſhall be conducted *vivâ voce*, and be followed with an immediate judgment, if the Court incline; and that otherwiſe, they may order informations on the caſe, for the better and more deliberate trial of the queſtion.

No. 41. 42.

Cognizance of relevancy is peculiar to the Court.

AND here, before proceeding, I muſt take notice, that the cognizance of the relevancy of the charge is the province of the Judge alone, and belongs not in anywiſe to the perſons of aſſize. It is true, the perſons cited to that ſervice are in Court at the time of the debate, becauſe they muſt be ready to anſwer on being called; but ſtill, as was found in the caſe

[1] In the trial of Montgomery for perjury, (Jan. 19. 1716), "The Lords "obſerving a paragraph in the information for the pannel, whereof the matter "had not entered the previous verbal pleading, they deſired him, if he choſe, to "dictate his anſwers thereto to the clerk."

caſe of Gray and Duncan, in July 1751, it could not invalidate the proceedings, that ſome or even all of them were abſent on that occaſion. For they are not yet an aſſize, but attending only to be inſtalled at the time when the interlocutor of relevancy is given; and then, and no ſooner, and in the cloſe of that interlocutor, and as a conſequence of the finding of the relevancy, the libel, as ſuſtained, is ſent to an aſſize. It is true, that in a few inſtances, ſuch as the trial of the inſurgents who fought at Pentland Hills, and in the caſe of Charles Robertſon and others, the debate on the relevancy took place only after naming the aſſize: but this was an unuſual proceeding, and owing only to the proſecutor's anxiety on thoſe occaſions, to have the aſſize fully informed of the law touching the matters there at iſſue.

Maclaurin, No. 59. p. 136.

Dec. 5. 1666.

March 6. 1671.

Interlocutor of relevancy, its proper uſe.

THUS much being premiſed, we may now attend to the form and import of the judgment which paſſes on this debate. The proper queſtion concerning the relevancy of the libel is only this: Is the form of the libel good? Does it ſet forth in the outſet an offence which is known in the law of Scotland? Does it relate the fact with the neceſſary circumſtances? And does the fact ſo related amount to the ſpecies of crime which is ſtated in the major propoſition of the libel? In ſhort, does the libel contain ſuch a charge as is regular *ex facie*, and ought to be remitted to the knowledge of an aſſize? Theſe are, therefore, the only matters which properly ought to be debated, touched upon, or conſidered, at this period of the trial.

As to the ſufficiency of the evidence which may ſerve to convict the pannel; this is within the province of the jury: And, beſides, it is ſuch a matter, of which no opi-

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nion can, to any advantage be formed, until the concluſion of the proof, when there ſhall be a ſettled caſe, or ſtate of facts, whereon to deliberate concerning the inference which may warrantably be made. As to the pannel's defences likewiſe; although, for the reaſons already given, it is proper that he ſhould mention generally, what they are to be; yet to limit and define hypothetically, beforehand, the particular ſhape and terms in which only thoſe defences ſhall be good, or to fix the preciſe extent to which, when proved, they ſhall be available to him; this too, would plainly be a raſh attempt, and one in which it can very ſeldom be within the reach of human ſagacity to ſucceed. Becauſe, to form his opinion of the defence, the Judge muſt have the true ſtate of facts before him, on the part both of the proſecutor and the pannel, ſince their caſes mutually modify and affect each other; and becauſe ſo many are the poſſible varieties and combinations of fact, even in a ſhort and ſimple ſtory, and much more in one which has any variety or detail of parts, that it is not in the wiſdom or foreſight of any Judge, fully to provide for, or embrace them. Again, in regard to the due puniſhment of the crime charged; it may be very proper, that, at remitting to the aſſize, the Judge ſhould inform them generally, of the conſequences in law of a full conviction in terms of the libel as it is laid: but ſtill it is better, for the moſt part, that no judgment in that reſpect ſhould paſs into the record of Court, but all be left open for applying the law to the true caſe, as it ſhall be eſtabliſhed by the verdict of aſſize. For, not till then, can it be diſcerned with any certainty, what ought to be the preciſe influence of the peculiar qualities under which the charge may be proved, or of the alleviating

leviating circumſtances that may be returned in favour of the pannel. CHAP. X.

THE proceedings of the Juſtice and his deputies, from the time at leaſt of the ſtatute of James VI. [1] concerning Art and Part, appear to have been ruled accordingly, by theſe reaſonable conſiderations. How ſpecial ſoever the libel that was laid before the Juſtice, he gave out his interlocutor of relevancy in general terms, ſuſtaining or diſmiſſing the charge; and if he took any notice of the defences pleaded for the pannel, it was in terms equally general, either repelling or admitting them to proof: On neither ſide, was he in uſe to limit, or deſcribe, in his judgment, the ſpecial ſtate of facts which was to be relevant: He remitted both charge and defence, and the ſufficiency of the proof of both, whether direct or preſumptive, to the deciſion of the jury, who were to determine on the matter complexly, and, on the whole circumſtances of the caſe, as they ſhould be proved before them. In like manner, for the moſt part, the Juſtice avoided to pronounce on the pains of law for the offence libelled, till the verdict were before him; when, and no ſooner, it was neceſſary for him to ſettle his opinion on that head.

Hiſtory of the interlocutor of relevancy.

IN

[1] I have ſaid here, that ſuch was the practice from the time of the ſtatute of James VI. concerning Art and Part. The truth, however, is, that I find no inſtance of a ſpecial or articulate interlocutor of relevancy, in the records of any even more ancient times. But as, according to the evidence of the ſtatute of James, the libel itſelf, before that time, was ſpecial and articulate; ſo, in ſubſtance the interlocutor became ſo too, by reference to the ſtory detailed in the libel. At that period, the libel itſelf did not enter the record, but a ſhort note of it only, ſtating, very briefly, the crime of which the pannel was accuſed: So that, on this head, I can only judge of the fact, from what is narrated in the act of Ja. VI.

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In confirmation of this account, reference may be made to the trial of William Bickarton, for going armed with piſtols, within a mile of the King's reſidence. Certain pleas were uſed for him, and, in particular, he maintained that the libel was not relevant to infer the pain of death. But, inſtead of giving any anſwer on that head, the Juſtice remits the caſe to an aſſize, "reſerving the conſideration of the "import of the defences, to the pronouncing of doom, "*conform to the laws of the realm*[1];" wherein the Juſtice ſeems to refer to this, as the known and ſettled order of proceeding, according to the cuſtom of the land. In like manner, in the trial of Patrick and Adam Lermont for mutilation, on its being ſtated for them, that the crime is not capital, the Juſtice avoids to give any deciſion, and "continuis his anſwer to be givin *ſuo loco*." Again, on the libel againſt Thomas Bryce, as art and part of murder, by reſetting the killer; Sir Thomas Hope, the Lord Advocate, pleads, (but here no judgment was given), "That the far-"reſt that this defence could work, is their liberatione of "*ordinaria pœna*, quilk tuiches not the point of relevancie, "nor yit can be ane exception to hindering dittay to paſs to "the knawledge of ane aſſyſe; bot is onlie pertinent to the "Juſtice-Generall, after tryall, to conſidder quidder the ſamyn "mereittes *pœnam ordinariam vel extraordinariam*." The Court followed the like order of proceeding at a later period, in the trial of Elizabeth Mure for adultery, "where the Juſ-"tices finds the dittay relevant, and ordaines the ſamin to "paſs to the knowledge of ane aſſiſe, and declaires, that if "the pannel be found guiltie, that after the verdict of the "aſſyſe,

Dec. 15. 1581.

March 8. 1605.

March 22. 1639.

Dec. 10. 1668.

1 This is taken from the MS. Abridgment in the Advocates' Library; for the record for 1581 is not now extant.

" aſſyſe, they will tak to conſideratione the puniſhment, in " reſpect it was alledged for the pannel, that notour adulte- " ry is not ſubſumed in the lybell, and ſo the payne of death " not to be inflicted conforme thereto."

In the trial of William Maxwell, Barbara Johnſton and others, indicted for treaſonable invaſion of the houſe of Newly, after hearing the pannels on their defences, ſuch as that ratihabition was not relevant, and the like, " the Juſtice " repellis the allegeance *loco quo*, reſervand the pannellis in- " formatione yrof to the aſſyſe." In the caſe too, of William Lowis, who being accuſed of murder, put his defence on this fact, that the deceaſed had lived ſeventeen months after receiving the wounds libelled, " the Juſtice remittis this mat- " tir to the aſſize, to be tryit and cognoſcit be thaime, according " to their knawledge and conſcience." And again, the Juſtice does the like in the caſe of Mathew Culdie, another caſe of murder [1], where the queſtion was, whether the deceaſed died of the injuries libelled, or owing to other cauſes. Obſerve likewiſe the caſe of Mowat of Allaberrie, where, after a debate on the plea of ſelf-defence againſt a charge of mutilation, " the Juſtice remittis this matter and tryel yrof to the knaw- " ledge of ane aſſyſe."

June 21. 1605.

April 18. 1610.

Jan. 10. 1616.

July 15. 1642.

History of the interlocutor of relevancy.

As in theſe inſtances the Court ſend the whole caſe, charge and defences, to the conſideration of the aſſize, *ſimpliciter* and at large; ſo the following precedents as clearly ſhow, that, in the opinion of thoſe ancient times, (though I will not affirm that

[1] " The Juſtice ordainis the matter to paſs to the tryall of ane aſſyſe, and " thay to tak cognitioun yruntill, as thai think guid, for ye full reſolution of con- " ſcience."

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that there are no inſtances of the contrary), it was the proper and peculiar province of the aſſize to determine for themſelves, how far the facts, circumſtances and preſumptions which appeared in evidence, were or were not ſufficient to convict. So it was openly declared, in the interlocutor of relevancy on the libel againſt John Meldrum, for burning the tower of Frendraught, "the Juſtices and aſſeſſors haveing "ſeen and conſiderit the libel with the defences, &c. Be in- "terlocutor, findis the dittay, poſitivelie ſet doun anent the "fact and burning libellit, relevant, and remittis the ſamyn "to the knawledge of an aſſyze; and concerning the evi- "dences, preſumptions and argumentis ſet down in the ſaid "dittay, remittis the ſame to be conſiderit be the ſaid aſſize, "*as only proper to thaime.*" In a later caſe of fire-raiſing, that of David Cunningham, where alſo the libel bore a long train of *indicia*, which the pannel objected to as not concluſive of his guilt, the Lord Advocate maintained, among other topics, that the qualifications of evidence belonged to, and were meant only for the aſſize; and that all debate on them was out of place, till the proof were taken and finiſhed. Accordingly, the interlocutor finds the libel relevant in the general[1], and refrains from taking any notice of the particular preſumptions. Soon after this, there was another opportunity of laying down the law more expreſsly on that head. This was in the trial of Margaret Black for child-murder;

Aug. 2. and 3. 1633.

July 30. 1677.

Aug. 4. 1677.

[1] "Having conſidered the libel and debate anent the relevancie, doe find that "the libel, in ſua far as it beares, that the pannel Alexander Cunningham did, "upon the fyfth November laſt, or ane or ather of the dayes of the ſaid month, "commit the cryme of wilfull fire-raiſing, by burning a part of the Earle of "Kinghorn's houſe of Glamis, relevant." On which the pannel took inſtruments, that the particular qualifications of the libel were not found relevant. The Court plainly meant to refrain from finding any thing on that ſubject.

murder; where the dittay bore thoſe preſumptions of concealment of pregnancy, ſecret birth and the like, which are uſually libelled in ſuch caſes. But as to theſe the Juſtice would not take upon him to determine. On the contrary, he "finds "the pannell's murdering her own child relevant, and remitts "the ſame to the knowledge of the aſſize; and alſo they remitt "to the aſſyſe to conſider, how farre the probation of the "preſumptions and circumſtances libelled does infer the pan-"nall guiltie of the ſaid crime of murder."

Hiſtory of the interlocutor of relevancy.

SUCH too, ſeems to have been the ordinary ſtyle of interlocutor, for a while after the inſtitution of the preſent Court of Juſticiary; not indeed without ſome, though but rare exceptions. So it is however, that ſoon after that period, and I think chiefly between the years 1685 and 1693, this ancient and approved faſhion came to be laid aſide for another, certainly in nowiſe ſo wholeſome or ſo convenient, but which at length gained full poſſeſſion of our practice, and continued to rule it for a long courſe of years. In 1678, Sir George Mackenzie had publiſhed his Treatiſe of our Criminal Law; in ſeveral parts of which, and eſpecially in his chapter of Aſſizes, he was a zealous advocate againſt the practice of former times, as committing too much to the judgment of the aſſize, and taking them out of the control of the Judge in their deciſion of the many nice and intricate queſtions, ſo often occurring, as to the qualifications of art and part, and the relevancy or ſufficiency of probation: Whereby, (ſays he), "they are put to decide what has "troubled the ableſt doctors and authors, and ſo oftentimes "they return unformal verdicts." Again, in another place, he complains of the debate which took place before the aſſize, after cloſing the proof. "For here (ſays he) laws, de-

See Part I. tit. 35. No. 2.; Part II. tit. 23. No. 4.

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" ciſions, and doctors, are alleged to aſſizers who under-
" ſtand neither;" and this he likens to the putting of a ſharp ſword into the hands of a blind man. As a remedy for this evil, (as he eſteemed it), Mackenzie adviſed, that inſtead of libelling art and part in general, in terms of the ſtatute of James VI., the proſecutor ſhould be very ſpecial in ſetting forth the qualifications of art and part, or the detail of the pannel's concern, whatſoever, in the fact, and thus afford the Judge an opportunity of pronouncing on thoſe points, and ſo inſtructing the aſſize. His notion in ſhort was, that " *regu-*
" *lariter* all that is in the libel falls under the cognition of the
" Juſtices," and indeed he concludes with expreſſing a wiſh,
" that to prevent all thir difficulties, the Juſtices were Judges
" both to relevancy and probation, which overture ſeems moſt
" fit and advantageous for theſe ſubſequent reaſons," which he proceeds to aſſign. I muſt, however, be impartial enough to obſerve, that what Mackenzie ſeems to have been chiefly deſirous of ſecuring for the Court, was not ſo much the ſufficiency of the evidence to convict, as the relevancy of the qualifications of acceſſion to the guilt of the crime libelled. But in treating of this matter, he in more than one place expreſſed himſelf in ſuch terms, as afforded a handle at leaſt for attributing to the Court, in preference to the aſſize, the cogniſance of all and whatſoever matters, which ſhould anyhow be inſerted in the libel; as becoming thereby the fit ſubjects of a judgment of *relevancy*, as at that time it was thought proper to be called. And in this opinion he at leaſt was not ſingular: For the author of the MS. Abridgment of the Books of Adjournal, which ſeems to have been made towards the end of laſt century, at leaſt that part of it to which I refer, comments as follows on the caſe of Margaret Taylor, in June 1663, where the libel for child-murder was

ſpecial

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ſpecial as to the preſumptions of the woman's guilt: "Obſerve "(ſays he), here a ſure way taken to prevent ſcruples that "might ariſe before an aſſize, for want of a poſitive proba- "tion of the murder. The purſuer libels all the preſump- "tions, and the extrajudicial confeſſion whereupon he founds; "which did put the Juſtices to give their interlocutor upon the "relevancy of that probation, as it was circumſtantiate; and "the Juſtice depute having found it ſo, the aſſize had nothing "ado but to conſider, whether theſe circumſtances and pre- "ſumptions were proven."

Maclaurin's Introduction, p. 21.

Hiſtory of the interlocutor of relevancy.

WHETHER owing to the weight of Mackenzie's authority, or that he only delivered what was the prevailing opinion with the lawyers of his time; ſo it is, that about the period already mentioned, the practice became common, and almoſt uniform, which had only been uſed at times before, of drawing libels with a full detail of the whole circumſtances and grounds of preſumption from which art and part, or any ſort or degree of concern in the matter libelled, might be inferred againſt the pannel. And thence ſprung the faſhion, a faſhion which was indeed the very object of this way of libelling, of the Court giving out their interlocutor of relevancy in terms equally articulate and circumſtantial as the indictment: that is to ſay, ſpecially repelling or ſuſtaining the ſeveral articles of the charge, defences, and replies; aſſuming, hypothetically, the various ſtates and combinations of the fact, as far as theſe could be foreſeen; and aſcertaining beforehand, the conſequences in law of every thing that was alleged on either ſide, both jointly and ſeparately taken, whether with reſpect to the qualifications of art and part, the relevancy of the defences, the ſufficiency of the preſumptions of guilt, or the due pains of law, if the pannel ſhould be con-

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victed. Of all which the plain tendency, and indeed the avowed object and purpoſe was, to obtain from the jury a ſpecial verdict on the facts thus pointed out to their attention, and to limit their inquiries to this ſingle point, Were thoſe facts proved or not in terms of the interlocutor of the Lords; their effect, if proved, being already ſettled by the authority of the Court, which the aſſize would not ordinarily be inclined to diſpute. The ſhape and true character of this ſort of judgment will beſt be underſtood from a few examples, which I have ſelected among caſes of different kinds, and which occurred at different periods of time.

Special interlocutors of relevancy. Aug. 19. 1691.

In the caſe of the Maſter of Tarbat, "The Lords, &c. "find the lybel bearing that the Maſter of Tarbat, Enſign "Andrew Mowat, or James Sinclair, killed the ſaid umqhile "Elias Poiſet, by running him throw the body, relevant to "infer the ſlaughter againſt the ſaids pannells, or any of "them; as alſo, their having their ſwords drawn at the time "of the ſlaughter, relevant to infer art and part of the ſaid "ſlaughter: And likewiſe, *ſeparatim*, finds the qualifications "lybelled againſt *Enſign Mowat*, being conjoined with that "preſumption alledged in the debate, viz. that the defunct was "ſeen lying at his feet, relevant to infer art and part, and "the pains lybelled, unleſs Enſign Mowat prove that the "ſword found with him, was at the time of the ſlaughter, in "the hand of another perſon, and that Mowat himſelf did "only take up the ſamen after the ſlaughter was committed; in "which caſe, they find the ſamen relevant to reſtrict the ſaid "qualifications to infer an arbitrary puniſhment: And alſo, "they, *ſeparatim*, find the qualifications lybelled againſt the "*Maſter of Tarbat*, only relevant to infer an arbitrary puniſh-"ment; and finds the defence, that the ſlaughter was com-

"mitted

" mitted in ſelf defence, relevant in thir terms, viz. That af-
" ter the ſaid pannells in the firſt libel, came out of George
" Poiſet's chamber, and after their ſecond attempt, by beat-
" ing and raping at his chamber door, and that they were ſet
" down peaceably at the fireſide, the defunct and his brethren,
" and Mr de la Maſſie came in into the room, and aſſaulted
" the pannells, by preſenting cockit piſtols to them, or thruſt-
" ing at them with drawn ſwords, before the pannels made
" any violent oppoſition to them, relevant to reſtrict the lybel
" to an arbitrary puniſhment; and alſo, finds the pannels en-
" tering into George Poiſet's chamber, and beating and
" blooding of him, relevant to infer an arbitrary puniſhment;
" and repells the haill other defences, duplies and quadu-
" plies proponed for the pannells."

Special interlocutors of relevancy. July 23. 1716.

In the caſe of Roſs and Roberts, " The Lords, &c. find the
" pannel Thomas Roſs, at the time and place libelled, his
" thruſting the defunct James Small with a drawn knife in
" the breaſt, and thereby giving him a wound, whereof he
" ſhortly after died, relevant to infer the pain of death, and
" confiſcation of moveables: And find the defence proponed
" for Thomas Roſs, pannel, viz. that the defunct, before he
" received his wound, his provoking the pannel by bidding
" both King George and the pannel kiſs his arſe, and there-
" after giving him the pannel a blow on the face with his fiſt,
" and then pulling him down to the ground, and beating him
" with a carr rung, to the imminent danger of his life, joint-
" ly relevant to reſtrict the libel to an arbitrary puniſhment;
" but ſuſtained the reply, viz. that at the time of giving the
" wound to the defunct, the ſaid defunct's hands were held
" by Jaffrey Roberts, the other pannel, relevant to elide the
" defence: and find, that Jaffrey Roberts, the other pannel,

" his

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" his holding the defunct's hands, when the wound was given " by an occult weapon, relevant only to infer an arbitrary " puniſhment as to him; and repels the haill other defences " proponed for the pannels."

Special interlocutors of relevancy. Feb. 6. 1718.

In the caſe of Stuart Abercrombie, " The Lords, &c. find " the ſaid pannel, his having about the time and place libel- " ed, given Alexander Hay the defunct, with a ſword or ſome " deadly weapon, a mortal wound, whereof the ſaid defunct, " within a ſhort time, died, or that the ſaid pannel was art and " part thereof, relevant to infer the pain of death, and con- " fiſcation of moveables: And, *ſeparatim*, find that there be- " ing a previous quarrel betwixt the defunct and the pannel " ſome few days before the defunct was killed, and that the " pannel, with the defunct, were, a little before the murder, " ſeen together in the houſe or cellar of Mrs Lindſay, and no " other perſon in the room with them; and that the pannel " when he left Mr Chieſly, and the other company with whom " he was in the ſaid cellar, did leave behind him his hat in " that room, where the ſaid company was, where the ſame " remained till after the defunct came in wounded into the " cellar, and that two perſons were ſeen come out of the ſaid " cellar; and after they came out, were ſeen go on quarrel- " ling, one of whom wanted his hat, and had a light or " brown coloured coat, with clear buttons upon it, and that " the pannel had on him ſuch a coat that night, and that the " perſon without his hat, and with ſuch a coat as ſaid is, was " he that gave the other a ſtab or wound; and that the per- " ſon wounded, and returning back to the ſaid cellar, were " the defunct, and ſoon thereafter of his wound died; and that " the pannel, about that time, called at Mrs Johnſton's houſe in " Niddrie's Wynd, without his hat, and there borrowed one,

" and

" and ſoon thereafter was ſeized in his own houſe, and a ſword " found by him in the room, bowed, and with freſh blood in " the hollow parts of it, all jointly relevant to infer the fore- " ſaid pains, and repel the haill defences proponed for the " pannel."

Special interlocutors of relevancy. Feb. 23. 1719.

In the caſe of Crief and Cordie, " The Lords, &c. find the " ſaid pannels, or one or other of them, their having at the " time libelled given the defunct John Anderſon a wound in " his body with a bayonet, or ſome other deadly weapon, of " which wound the ſaid John Anderſon thereafter died, or " that one or other of the ſaids pannels was art and part " thereof, relevant to infer the pain of death and confiſca- " tion of moveables: And, *ſeparatim*, find, that the ſaid defunct " having, the time libelled, got a wound as ſaid is, whereof " he died, and that the ſaid wound was given him by a ſoul- " dier with an outterpee coat upon him; and that the ſaid ſoul- " dier thus clothed, and who gave the wound, was ſeen imme- " diately before to come out of Archibald Colden's houſe, and " immediately after the wound was given, the ſaid ſouldier ſo " clothed did return to the ſaid Archibald's houſe, and that no " ſouldier ſo clothed was ſeen in the ſaid houſe for ſome hours " before giving of the ſaid wound, or after the ſame was gi- " ven till the guard came into that houſe to apprehend the " murderer, excepting Neil Cordie, one of the pannels; and " that the next day thereafter the ſaid Neil Cordie was heard " to confeſs that he was the perſon who gave the wound, " and that day whereon he was apprehended he the ſaid Neil " Cordie did endeavour to make his eſcape, all jointly rele- " vant to infer, that the ſaid Neil Cordie is guilty of giving " the wound, and therefore liable to the foreſaid pains and " puniſhment: And farther the ſaid Lords find, that the ſaid

" deceaſed

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" deceaſed John Anderſon, with others in company with " him, in their paſſing by the houſe of Archibald Colden, " were, the time libelled, abuſed with ſcurrilous names, and " thereafter the ſaid John or any other of his company was " invaded in their perſons by one or two ſouldiers ſtanding " at the door of the ſaid Archibald's houſe, who had imme- " diately come out thereof, and that the ſaid John Crief and " Neil Cordie, pannels, only, and none other ſouldier, had im- " mediately before gone out of that houſe, relevant to infer " againſt or one, or either, or both of the ſaids pannels, an " arbitrary puniſhment, and repelled the haill defences pro- " poned for the pannels."

Special interlocutors of relevancy. Feb. 15. 1725.

In the caſe of Archibald Walker, " The Lords find, that " the pannel having, at the time libelled, wounded the de- " ceaſed Walter Macfarlane with a durk, of which wound " the ſaid Walter ſoon thereafter died, relevant to infer the " pain of death, and confiſcation of moveables: And, *ſepara-* " *tim*, for inferring the pannel's guilt of the foreſaid crime, " ſuſtained the following facts jointly relevant, viz. That the " pannel on that day, and in that room wherein the defunct " was killed, was ſeen in gripes or ſtruggling with the de- " funct, while Donald Macfun, the other perſon in company " with them, was lying in bed as aſleep; and that the pannel " was about that time ſeen with a drawn durk in his hand, and " blood upon him, and that the wound given to the defunct " whereof he died, upon ſearch appeared to have been given " with a durk, and that thereafter the pannel did retire and " abſcond, and offered reſiſtance to thoſe who came to appre- " hend him: Or for inferring the pannel's guilt of the foreſaid " crime, *ſeparatim*, find thoſe other facts jointly relevant, viz. " That he the pannel, in the month of June, or ſome ſhort time

" before

" before the murder, was heard to threaten revenge againſt the " defunct; and on that day, and in that room wherein the de- " funct was killed, that he the pannel was ſeen in gripes, or ſtrug- " gling with the defunct, and that the pannel was about that " time ſeen with a drawn durk in his hand and blood upon him, " and that the wound given to the defunct, whereof he died, " upon ſearch appeared to have been given with a durk; and " that thereafter the pannel did retire and abſcond, and of- " fered reſiſtance to thoſe who came to apprehend him; and " repels the haill defences proponed for the pannel."

Special interlocutors of relevancy. Oct. 1. 1725.

In the caſe of James Darrach, &c. " The Lords finds the " pannels, at the time and place libelled, that their aſſembling " themſelves tumultuouſly or riotouſly, or invading or vio- " lently breaking into the houſe libelled, or the carrying " away or breaking or deſtroying any of the goods or fur- " niture thereof, or their being art or part of the ſame, or " any of thoſe facts *ſeparatim*, relevant to infer an arbitrary " puniſhment: And find the pannels or any of them their be- " ginning to demoliſh the houſe libelled, by breaking or pull- " ing down with force the doors or windows, after the ſaids " pannels had entered the ſaid houſe, or being art and part of " the ſame, relevant to infer the pain of death and confiſca- " tion of moveables; and find the pannels or any of them " that they did, at the time and place libelled, with forge- " hammers or otherwiſe knock down the partitions in the " houſe, or part of the ſame, or pull down the linings or part " thereof, or broke down the roof or part thereof, or pulled " away or deſtroyed the ſclates or lead, or were art and part " of the ſamin, or any of the ſaid facts, relevant to infer the " pain of death and confiſcation of moveables; and find the " defence, viz. that the roof of the ſaid houſe was immedi-

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" ately after the ſaid riot in the ſame condition as it was
" when before the rabble entered the ſame, relevant to elide
" part of the libel relating to the ſaid roof; and finds the
" breaking and defacing the ſtatues or other ornaments of
" the houſe or gardens, relevant to infer an arbitrary puniſh-
" ment: And finds that the pannels or any of them, at the
" time and place libelled, aſſaulted or invaded the guard, eſ-
" pecially with ſtones or battons, conſiſting of his Majeſty's
" forces, or being art and part thereof, relevant to infer an
" arbitrary puniſhment; and finds that the pannels, at the
" time and place libelled, aſſembled themſelves in arms, rele-
" vant to infer an arbitrary puniſhment; and finds that the
" defence offered, viz. that the pannels provided themſelves
" with arms by order of the Magiſtrates, is relevant to ex-
" culpate them from the crime of ſimply aſſembling them-
" ſelves in arms: And finds that the pannels or any of them,
" at the time and place libelled, purſued his Majeſty's forces
" when they retired from Glaſgow, and more eſpecially that
" they purſued them with arms or drums, or warlike weapons,
" or in a hoſtile warlike manner, to retire to Dunbarton in the
" manner and on the occaſion libelled, or that they were art and
" part of the ſame, or any of the ſaids facts, relevant to infer
" an arbitrary puniſhment; and finds that the pannels or any
" of them did endeavour to excite the inhabitants of the
" town of Dunbarton to riſe in arms, or oppoſe the ſaid troops
" or forces, or to refuſe to give them admittance into their
" town, or that they were art and part thereof, relevant to
" infer an arbitrary puniſhment; and finds that the pannels
" or any of them at the time and place libelled, did make
" any of the ſoldiers priſoners, or did beat, bruiſe or other-
" ways abuſe any of them, or were art and part of the ſamin,
" relevant to infer an arbitrary puniſhment: And finds the
" defence

" defence of *alibi* offered for the pannels James and William " Darrachs, viz. that they were in bed at their own houſe " on Thurſday the 24th, being the day libelled, about ten " of the clock at night, and continued there till ſeven the " next morning, relevant to exculpate them or either of them " from any facts ſuppoſed to be actually done by them during " the aforeſaid time: And find that the defence offered for " James Falconer, viz. that for two days before the 24th day " of June laſt, and until Friday morning the 25th, he was in " the paroch of Blantyre, ſix miles from Glaſgow, and that " he was continually there during the ſaid ſpace, relevant to " exculpate him as to any facts ſuppoſed to be actually done by " him during that time: And finds that the defence offered for " James Barns, viz, that if he was preſent in the houſe of Mr " Daniel Campbell of Shawfield, it was only to endeavour to " reſcue Mr Campbell's goods from the mob, and that he vo- " luntarily delivered or cauſed to be delivered what goods " he could to Mr Campbell's friends in order to their being " ſaved, relevant to exculpate him from the alleged crime of " unlawfully entering into the houſe or carrying away the " goods which he ſo delivered, or cauſed to be delivered; and " repels the haill defences proponed for the pannels."

IN the caſe of Buchanan, Luke, &c. " Suſtain the defence Oct. 11. 1725.
" offered for Henry Luke, viz. that he was active in diſper- " ſing ſeveral mobs, or endeavouring to reſtrain the inſur- " rection of the ſame, ſo far as to exculpate him from " any alleged crime of his being concerned in the ſaid " mobs; but not ſo far as to exculpate him, in caſe that " it be proved, that he at any other time libelled encouraged " the ſaid mobs by any deeds or words: And further ſuſtain " his defence, viz. that after continuing ſome time in town

 " peaceably,

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" peaceably, after the ſoldiers were gone, he went in compa-
" ny with two or three to an ale-houſe near the Weſt Port of
" Glaſgow, and did continue conſtantly in the ſaid houſe un-
" til the tumults that were beating and purſuing the ſoldiers
" were over, relevant to exculpate him during the ſaid time
" and no longer, *unleſs* ſome particular unlawful act ſhall be
" proved againſt him: Find the defence offered for Robert
" Main, viz. that he attended the Provoſt in order to diſperſe
" the mob, or was in Whitelaw's houſe from ten o'clock at
" night, till five in the morning, on Thurſday the 24th of June
" laſt, relevant to exculpate him from any crimes alleged to
" be committed by him in Mr Daniel Campbell of Shawfield's
" houſe, between the ſaid hours of ten o'clock at night, and
" five of the morning; but not relevant as to any other time.
" And further finds, the ſaid Robert Main's defence, viz.
" that he was forced to take a gun by the diſorderly people
" who were running that way, and who threatened to knock
" him down, if he would not take it, relevant to exculpate
" him as to his being in arms, by having the ſaid gun in
" that place where he was ſo forced; but not relevant as to
" his having the gun in any other place, *unleſs* the force was
" ſo continued, that he could not with ſafety lay his gun
" aſide, or withdraw from the company who forced him; and
" repelled," &c.

Hiſtory of the interlocutor of relevancy.

IT is eaſy to imagine, how much trouble and embarraſſment to a jury, and often to the Court themſelves, muſt have reſulted from interlocutors of relevancy, arranged on this anxious, critical, and reſtrictive plan. For what if the proſecutor made good a part only of the circumſtances aſſumed in the interlocutor; or, while he failed in proving ſome of theſe, what if others were eſtabliſhed, which he had not known, but

but which he might ſtill competently prove, under the general charge of art and part? Or again, though he ſucceeded in proving every particular enumerated in the interlocutor, yet ſtill it might not be under the preciſe ſame qualities and modifications; or it might ſo fall out, that theſe facts were combined with new and unforeſeen ones, and of an oppoſite tendency, which were proved on the part of the pannel. In any of theſe events, far from being aſſiſted, the jury were perplexed and confounded with thoſe previous imperfect and hypothetical judgments; and were truly left without a guide for their deciſion, although taught to believe withal, that a rule had been laid down to them, and that they were bound to proceed in ſtrict conformity to thoſe inſtructions of the Court. Add to all this, that jurymen could not always be expected to catch the preciſe meaning, or ſeize the true ſpirit of thoſe long and intricate judgments, and would often fall into errors and inaccuracies, in ſetting forth their return to the ſeveral articles and matters, thus pointed out to their attention. Not unfrequently too, on conſideration of the caſe, as it turned out in evidence, the Court muſt have ſeen cauſe to doubt of the abſolute propriety of their own previous hypothetical opinion, and to be deſirous of ſhifting, in ſome meaſure, the poſition which they had taken; finding perhaps, that they had required too little, or too much in the way of proof, or that the ſame concluſion might equally be maintained on other and ſeparate grounds, which had not till now been diſcovered. As might be expected, inſtances are to be found, in which the final ſentence varies from the interlocutor of relevancy [1]; and others, where all

1 In the caſe, for inſtance, of James Grahame, July 1. and 2. 1717, which was a charge of robbery, the Court found the defences jointly relevant to aſſoilzie the pannel:

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all the pains beſtowed on that judgment proved utterly fruitleſs, owing to a verdict which made return of quite a new ſtate of facts, whereof the Judge had again to try the relevancy, before he could proceed to ſentence.

Hiſtory of interlocutor of relevancy.

WITH all the inconveniencies which attended this practice, it kept, however, full poſſeſſion of our Courts for a courſe of many years. Nay, more, I cannot properly omit to mention, that this faſhion of weighing articulately the ſeveral preſumptions in a libel, proved the ground (at leaſt I can find no other account of it) of a ſtill more irregular ſort of judgment, which was thus. At the ſame time that the whole preſumptions libelled were found jointly relevant to infer the pannel's guilt of the crime charged, and to ſubject him to the full pains of law; ſeparate relevancies were found of arbitrary and inferior puniſhment, on theſe preſumptions ſeverally, or certain more limited combinations of them. In ſome ſituations, a judgment of this ſort may no doubt be proper, and ſuitable to the caſe; becauſe it may happen, that a part only of the particulars libelled are ſufficient, of themſelves, to infer ſome lower degree of guilt, and conſtitute an offence of its own kind, ſuch as deſerves and may warrantably receive puniſhment, under the libel which is in Court, if it be laid in the proper form. If a libel ſet forth the

pannel: "That he was compelled by being threatened with a piſtol or drawn "ſword, and dragged out of his maſter's houſe by two of Robert Roy's men, the "day before committing the crimes libelled, and that he continued under re-"ſtraint by force of arms, the time of committing the ſaid crimes." Now, the jury found that the firſt part of this defence, as to the threatening with ſword and piſtol, and the forcible taking the pannel out of his maſter's houſe was proved; but as to his continuance under reſtraint at the time of the robbery, where he was preſent, they ſaid nothing. Nevertheleſs, the Court aſſoilzied the pannel, as if this laſt circumſtance alſo had been proved.

the crime of wilful fire-raiſing, and alſo that of attempting or threatening to raiſe fire, and if it bear a detail of circumſtances correſponding to theſe ſeveral charges; certainly, ſuch of theſe preſumptions as amount to evidence of the attempt only, may regularly be ſuſtained to infer ſome inferior correction, as well as the charge of fire-raiſing, to infer the higher pains of death and confiſcation of goods. But the practice to which I now allude, was ſomething of quite a different character, and far more difficult to be defended: viz. the finding of a relevancy for arbitrary puniſhment, in reſpect of each or ſeveral of the preſumptions of guilt related in the libel, conſidering them as grounds only of ſuſpicion, or circumſtances of evidence of the capital and only crime laid in the libel. Strange as it may ſeem, the lawyers of thoſe times appear to have reaſoned thus: That if all the preſumptions libelled were jointly ſufficient to convict the pannel of the full charge, and to forfeit his life; certainly each of theſe, of itſelf, implied at leaſt ſome degree of wrong, ſome ſort of concern in the guilty deed, and juſtly expoſed him to chaſtiſement, leſs or more. This will better be underſtood after peruſal of the following judgments.

Special interlocutors of relevancy. Dec. 29. 1691.

In the caſe of Murray and Guine, "The Lords finds "the ſaid libel as it ſtands, complexly relevant to infer the "pain of death againſt both the pannels; as alſo find thir "qualifications, relevant to infer the ſame puniſhment, againſt "Murray, viz. that he had the ſaid tools and printing inſtru-"ments in the houſe taken by him, and when the Magiſtrates "came to ſearch, he threw a bag with ſome falſe dollars into "a bed, and had in the knees of his breeches ſome falſe mo-"ney, and that there was found in a coffer ſtanding in his "ſaid houſe, ſeveral of theſe falſe dollars not whitened: And "finds

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" finds the following qualifications relevant againſt Richard " Guine, to infer the foreſaid puniſhment, viz. that when the " Magiſtrates and company with them came into the ſaid " houſe, he was ſtanding in an upper room at the table in a " working pouſter, and upon the ſeeing of them he ſtretched " his arms alongſt the table and ſweeped off the aſhes, and that " there was a good fire in the room and two melting earthen " pots ſtanding before the fire, and a piece of metal found " in one of theſe earthen pots, with tongs, tools and inſtru- " ments of coinage, now produced, lying up and down the " room: And finds the preſumptions following againſt the pan- " nels *only relevant to infer an arbitrary puniſhment*, viz. the ſaid " John Murray his venting of falſe money, and the changing " of his name to that of Maxwell, *or any one of the above-men- " tioned ſpecial preſumptions, if they ſhall only be proven, and no " more:* And ſicklike againſt Richard Guine, the above-men- " tioned ſpecial qualifications againſt him *taken ſeparately*, and " his concealing and not revealing to the Magiſtrates, at or " after his taking, the uſe and deſign of theſe printing tools; " *any of which* being proven *ſeparatim* againſt the ſaid pannels, " the Lords declared to be ſufficient to infer an arbitrary " puniſhment againſt the ſaids two pannels *reſpectivè*, and " remitted," &c.

Special interlocutors of relevancy. Mar. 25. 1708.

In the caſe of Thomſon and Robertſon, " The Lords, &c. " find the crimes of theft or robbery, or houſe-breaking or " murder, as libelled in the principal indictment, relevant to " infer the pains libelled: And find that John Robertſon the " pannel, his meeting with Thomſon the Saturday night be- " fore the murder, in company with the defunct Helen Bell in " John Strachan's houſe in Edinburgh, and that Robertſon " did come upon Monday thereafter, being the day of the " murder

"murder libelled, before five in the morning, and called "for Thomſon out of his houſe by whiſtling or otherways, "and that Thomſon came out accordingly, and that they "went together from Thomſon's houſe, *relevant to infer an* "*arbitrary puniſhment;* and that they came back from the "Weſt Port together that Monday morning, about five o'clock, "and meeting the defunct Helen Bell did return with her, "and went out at the Weſt Port with her about that time, "and ſhe being thereafter found dead near that place, *rele-* "*vant to infer an arbitrary puniſhment;* and find that the pan- "nel from after that time, did change his manner of living, "and left off his conſtant working, and had money in great- "er plenty than formerly he uſed to have, and expending it "more ſuperfluouſly and idlely, and his inviting and dealing "with people to borrow and get money from Thomſon, and his "dealing and ſpeaking with a writer, and promiſing or giving "him money to conſider the writs of a houſe bought by Thom- "ſon, *relevant to infer an arbitrary puniſhment:* And find the de- "fence proponed for the pannel in his exculpation, viz. that "he was at work in his own ſhop the whole morning, from "before five in the morning of the day of the murder li- "belled till after nine, relevant to elide the libel."

Special interlocutors of relevancy. June 19. 1710.

IN the caſe of Riccards, "The Lords, &c. find the pannel's "having, the time libelled, in a rude and violent manner, with "a mortal weapon in his hand, attacked the perſon of Eli- "zabeth Bruce, &c. upon the highway betwixt the Abbey "and the town of Leith, and robbed from her her money "and goods, relevant to infer the pain of death: And find "that the pannel running off the highway, and letting the "goods belonging to the ſaid Elizabeth Bruce fall from him, "*or* that being ſeized in the flight and carried before a con-

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" ſtable, there was found about him a chopin ſtoup and other " goods whereof he could give no account, *or* that being " challenged by the ſaid Elizabeth Bruce for her money and " goods, he beat her, *all* ſeparatim *relevant to infer an arbitrary* " *puniſhment.*"

Special interlocutors of relevancy. Mar. 16. and 22. 1714.

In the caſe of James Macnab, who was charged with murder, done by him alone, " The Lords find the pannel his " thruſting at the defunct Thomas Machomiſh with a drawn " ſword the time libelled, and therewith giving him the " wound whereof he died in a ſhort ſpace thereafter, rele- " vant to infer the pain of death and confiſcation of move- " ables: And alſo find the ſaid pannel his having a ſword in " his hand the time the defunct received the ſaid wound, and " being thereafter ſeized, and his having a ſword ſtained with " blood, *relevant to infer an arbitrary puniſhment;* and likewiſe " find the pannel his having a ſword in his hand, and when " challenged for wounding the defunct, the pannel his threat- " ening to give the challengers as much if they did not hold " their tongues, and thereafter being ſeized with a bloody " ſword, *alſo relevant to infer an arbitrary puniſhment;* and re- " pelled the haill defences proponed for the pannel."

It ſeems difficult to defend theſe judgments, which appear however to have paſſed current at the time, and indeed are not without authority in the ancient practice of other countries, from the exceptions which would now be taken to them. In the caſe for inſtance of Guine and Murray, why ſhould a man be puniſhed for ſtanding in a working poſture at a table[1], and ſweeping the aſhes off it, with his hand?

[1] This verdict was returned againſt Guine, " Found it alſo proven againſt " the ſaid Richard Guine, his being found ſtanding at the table in the room " where

hand? Or, in the caſe of Robertſon, where was the harm of his being in company with the deceaſed the day before her death, and with another perſon at an early hour the next morning, or in his appearance of better circumſtances after a certain time? Articles theſe might be in the chain of evidence; and, in connection with others, they might ſerve to convict the pannel as art and part of the crime of murder, or of coining: But if ſhort of that meaſure, and to be conſidered ſeverally, they were truly of no weight in the ſcale, but quite as indifferent as riſing in the morning, or going to bed at night, or any other the moſt ordinary occurrence in life.

Preſent ſtyle of the interlocutor of relevancy.

ENOUGH has now been ſaid of this article of our ancient practice, to give the ſtudent a notion of its character and object, and of the inconveniencies, to uſe no ſtronger term, with which it was attended. In 1720, as mentioned on a former occaſion, the faſhion began to be revived, of drawing libels more ſuccinctly, and in a form more agreeable to the intendment of the ſtatute of James VI. concerning charges of art and part: whence neceſſarily enſued a correſponding change, and a more brief and general ſtyle, in the interlocutor of relevancy alſo. It is true, that practice for a while was far from being uniform in this reſpect; and I have already quoted interlocutors of a later date, which are caſt after

See Hiſtory of Art and Part, vol. i. p. 406.

1592, c. 153.

" where the fire, materials, and other coin was found, but his ſtanding not pro-
" ven to be in a working poſture." Upon this ſentence, Guine was baniſhed the kingdom for life.

This is another example of the difficulty which the Court ſometimes found of ſteering by the preciſe terms of their own interlocutor of relevancy. For here a puniſhment is inflicted, although the jury had found that a certain circumſtance was not proved, in the terms which the interlocutor of relevancy had adverted to, and required as material.

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the old faſhion. Thoſe however in 1725, are among the lateſt which enter ſo much at large into the ſtate of the evidence or preſumptions. And although for a conſiderable time afterwards, and down at leaſt to 1740, it was not unuſual for the interlocutor to deſcribe the ſeveral articles of charge, and declare their conſequences reſpectively, if the pannel ſhould be convicted of them; yet in the end, and by degrees, even this fulneſs was laid aſide, and the ſtyle of the judgment reformed into what it now is; viz. a general finding or declaration, that the libel, as laid, *is relevant to infer the pains of law.* The meaning whereof is only this, that it contains a regular and conſiſtent charge of a known crime, ſuch as may go to an aſſize, and juſtify a ſentence, in caſe the pannel ſhall be convicted. In this courſe, the import of all the evidence, of whatſoever ſort, comes to be judged of, when and where it ought; by the aſſize, with the benefit of the opinion of the Court, and after the concluſion of the proof on either part. At the ſame period, and with the help of the like inſtructions, the aſſize form their judgment of the relevancy of the pannel's pleas in exculpation; which can now be weighed, not according to any hypothetical or aſſumed ſtory, but as they really are, complexly with, and in their true and natural relation to, the facts which have been proved in ſupport of the proſecution. Laſt of all; upon this plan, inſtead of ſettling the puniſhment beforehand, the Judge keeps his opinion open in that reſpect, for application to the fact as it ſhall be returned to him in the verdict of the jury; in which way alone proviſion can be made for the accurate adjuſtment of the due pains that ought to be inflicted, or the caſe be viewed with that clearneſs and ſteadineſs of conception, which may warrant the pronouncing of a definitive judgment in that important

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ant article. So carefully has this been obſerved in later times, (and perhaps this caution has now been carried too far), that even on libels whereof one part charges *ex facie* a capital crime, and the other ſome inferior offence, the Court have rarely ſet down even this diſtinction in their interlocutor; but have choſen rather to find generally, that the libel and ſeveral articles thereof are relevant to infer the pains of law [1]. This was done, after hearing parties, in the caſe of David and William Dalgleiſh, where the charge was for an act of robbery, and an aſſault with intent to rob. April 4. 1780.

Style of interlocutor as to pannel's pleas and proof.

BEFORE we diſmiſs the interlocutor of relevancy, we have ſtill to attend to that part of it which relates to the pannel's defences, and the proof that is allowed him of what he alleges in exculpation, or to extenuate his crime. In this important article, the practice of later times, as it is far more favourable to the pannel than that of our forefathers, and lays open to him a much wider range of inquiry; ſo is it alſo

[1] When this phraſe occurs in an interlocutor, and is expreſsly oppoſed to the phraſe of arbitrary puniſhment, uſed in other articles of the ſame interlocutor, it has often been underſtood to ſignify the pains of death, and confiſcation of moveables. But the Court have not by any means been uniform in their way of uſing it; and numerous inſtances might be mentioned, where it was uſed, when only an arbitrary puniſhment could be in view. See for inſtance, the caſe of John Watſon, 21ſt January 1760; of Kirkpatrick and others, 17th November 1760; and of John Edwards, 17th March 1761.

In the caſe of Watſon, Baillie, and others, (26th July 1714), the pannels objected that the libel was only relevant to infer an arbitrary puniſhment, becauſe it concluded for the pains of law, and not ſpecially for thoſe of death and ſatisfaction. The anſwer was ſuſtained, that it was a general and pliable expreſſion, which was to be applied by the Court to the ſeveral offences libelled, according to their degree in law.

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alſo far more reaſonable in itſelf, and more conducive to material juſtice.

No proof formerly of defences contrary to the libel.

Of old, the pannel was confined to a very narrow and diſadvantageous field, by the received maxim of law againſt admitting any defence that was contrary to the averment of the libel; a maxim which ſounds ſtrange in our ears, but is taught in the writings of many foreign lawyers [1], and ſeems to have found reception formerly into the practice of other countries as well as ours. The meaning of it was thus; for inſtance, in a caſe of murder: If the libel charged that the pannel gave the deceaſed a mortal wound, of which wound he languiſhed for ſome days, and thereof died; it was in vain for the pannel to allege, for he could not be allowed to prove, that in truth the man died of ſome other ailment, or that the wound was not of its own nature mortal, but was exaſperated and made mortal by the patient's intemperance and evil treatment of it, or his obſtinacy in refuſing all aſſiſtance. By the ſame rule, as little could the pannel allege a caſual rencounter, or ſelf defence, or great and ſudden provocation, if the libel ſet forth that the ſlaughter was done by lying in wait, or on challenge to fight a ſingle combat [2].

No proof formerly of defences contrary to the libel.

The ſort of argument, ſo far as I can collect it, by which our lawyers juſtified ſo ſtrange a reſtriction of the pannel's proof,

[1] Monteſquieu ſpeaks of it as the prevailing law in France in his time: "*En France, l'accuſé ne produit point ſes temoins, et il eſt très rare qu'on y admette "ce que l'on appelle les faits juſtificatifs.*" *Eſprit de Loix, liv.* 29. *c.* 11.

[2] See Mackenzie, Part 2. tit. 22. No. 2. where judgments to this effect are quoted.

proof, was to this purpoſe: That the accuſer had ſet forth certain facts and qualities in his libel, and muſt eſtabliſh theſe with evidence, to ſucceed in his proſecution: that if he failed to prove them, the pannel muſt be acquitted of courſe for that reaſon only, though there were no evidence on his part at all: and that, on the other hand, if the proſecutor proved his libel, it could ſerve to no purpoſe, but to occaſion perjury, to admit a contrary proof on the part of the pannel; whoſe witneſſes, if they contradicted what had already been proved by thoſe for the proſecution, muſt be ſwearing falſely; which it was the buſineſs of the Court to deny them an opportunity of doing. "*Quando delictum* "*eſt* PLENE PROBATUM, (ſays the commentator Baldus [1]), "*per teſtes affirmantes, non eſt admittenda contraria probatio per* "*teſtes negantes.*" In like manner, Sir George Mackenzie: "To admit contrary probations, (ſays he), were to open a "door to perjury." And much to the ſame purpoſe, the pleadings in caſes which were actually under trial: "This "alledgeance being directly contrair to the libel, cannot "be admitted. Beſide that the purſuer offering to prove "the libel as it ſtands, his probation, as it has the pre- "ference, ſo it cannot be redargued by a contrary proof: "For, ſeeing the laws both of God and man has ſo far "eſtabliſhed the credit of two witneſſes, to hold their con- "curring teſtimony on oath to be *undoubtedly true;* there "can no proof be admitted of facts directly contrary to the "truth of thoſe eſtabliſhed by their joint teſtimony. More "eſpecially, conſidering that witneſſes verifying a crime a- "gainſt a perſon accuſed thereof, are leſs to be ſuſpected, "(particularly at the inſtance of the public), of partiality, "than

Nov. 3. 1712, caſe of John Grahame.

[1] *In. l. fin. Cod. de Prob.*

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" than any that can poſſibly be adduced by the party accu-
" ſed, who, from the natural love of life, is under the temp-
" tation of doing every thing, *per fas aut nefas*, that
" may prove a mean of his preſervation." Another topic was ſometimes inſiſted on; that the proſecutor's witneſſes muſt be as fit to prove the defences as the libel, both reſting generally on matters nearly coincident in point of time and place; and that if, notwithſtanding all due pains in croſs interrogating them, and ſifting their teſtimony, they ſtill appeared to prove the libel, there could be no reaſon for any farther inquiry on the ſubject. In ſhort, the notion of a conjunct probation of the libel and defences before the aſſize, was thought too dangerous to be admitted: The prerogative of proving, and the choice of the witneſſes, were to be given to one of the parties only; and on the evidence taken by that party, the iſſue was entirely to depend. To mention but one inſtance of ſo notorious a point of practice: In the caſe of William Sommerville, who was indicted for the murder of his mother, a great part of the debate turns on this point, To whom ſhould the prerogative of probation be given? Should the proſecutor be allowed to prove, that the woman died of the injuries libelled, or the pannel to prove, that ſhe died from other cauſes. The Court were of opinion for the proſecutor [1]; the defences were repelled; and the libel alone was remitted to an aſſize.

See Mackenzie, Part 2. tit. 22. No. 1.

Dec. 24. 1669.

No proof formerly of defences contrary to the libel.

I NEED hardly expatiate on the obvious reaſons for doubting, I will not ſay the propriety only, but the juſtice even, of

1 " The Juſtice repells the defence and duply proponed for the pannel, in re-
" ſpect of the dittay and reply; and finds the dittay relevant; and ordaynes the
" famin to paſs to the knowledge of ane aſſize."

of this courſe of trial. It is plain, that the truth is only to be obtained by comparing the teſtimonies on either ſide, and allowing both parties a proof at large, of all circumſtances that are anywiſe pertinent to the iſſue. Where the intereſts which are at ſtake are ſo important, the light is not to be ſhut out, from an over-anxious regard to the conſcience of witneſſes, or out of fear that ſuch as are not confirmed in the due regard to truth, may involve themſelves in the guilt of perjury: In ſuch caſes, men muſt be left to be the guardians of their own faith, ſince juſtice cannot otherwiſe be done. Beſides, one of the moſt effectual means of preventing perjury, is to allow full freedom of proof, whereby any one who ſhall venture on a falſehood, may be liable to be detected: ſo that in refuſing the pannel a proof of his allegations, leſt the witneſſes on his part might ſwear falſely in his behalf, our ancient practice truly tended to conceal, and to tempt to perjury on the part of the proſecution. Farther, as Mackenzie has remarked, how eaſy was it under this faſhion, for the proſecutor ſo to qualify and characterize the fact in drawing his libel, as to exclude all the pannel's defences whatſoever; while, at the ſame time, ſome of thoſe qualities might be nowiſe material for prevailing in the concluſions of the libel.

Exceptions to that rule.

And indeed, ſo manifeſt was the hardſhip of this maxim in its application to certain defences, that notwithſtanding their ſtrict obſervance of it in the ordinary caſe, our Judges were conſtrained to abandon it in thoſe particular inſtances: a deviation from principle which they endeavoured to excuſe as beſt they could, and ſometimes with diſtinctions of no very ſubſtantial kind. Thus, ſelf-defence was occaſionally received in trial

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for murder: Becauſe, ſaid our lawyers, this plea admits the main fact in the libel, which is the ſlaughter; and as to the malice aforethought, this, though charged, need not be proved on the proſecutor's part, but is implied in his favour from the act of killing. In like manner, the defence of *alibi*, though more abſolutely excluſive of the libel than moſt others, was commonly admitted to proof [1]; for which I find little apology offered, but the plain and urgent reaſon of the thing. But even as to this defence of *alibi*, it was Mackenzie's opinion, ſwayed by the prevailing diſlike of contrary proofs, that it ought not to be ſent to the aſſize, jointly with the libel, but ſhould be the ſubject of a ſeparate and preliminary proof before the Judge: who, if he found the evidence of *alibi* not ſufficient, might then and no ſooner remit the libel to an aſſize. "But I think, (ſays he) in this caſe *alibi* ſhould "be ſtrongly qualified; and if it be, then both the libel and "defence ought to be admitted to probation; but ſo that if "the *Judge* find *alibi* not to be clearly proved, then only he "ſhould allow the purſuer to prove his libel; for to admit "contrary probations were to open a door to perjury; and "not to allow the purſuer to prove alſo, were to infer a crime "without probation. For the pannel's not proving his "defence doth not *in criminalibus* relieve the accuſer from "the neceſſity of proving his libel, as it doth in civil caſes; "and

Part 2. tit. 22. No. 3.

1 "A defence contrary to the averment of the libel may be ſuſtained, if it re-"ſolve in a poſitive propoſition. A pannel indicted for committing a crime at "a certain place cannot be allowed to bring witneſſes to prove in general that "propoſition, that he was not there. But if he limit his propoſition by offering "to prove, that at the time libelled, he was *alibi*, though that propoſition is "contrary to the libel, every day's practice allows it relevant to be proven."

"and this ſeems to be our law, and more juſt and Chriſtian "than *conjunct probations* are[1]."

Exceptions to that rule.

EXTRAORDINARY as this propoſal may ſeem, the truth is, that the order of proceeding thus ſuggeſted by Mackenzie, for the caſe of *alibi*, had really been obſerved in ſome inſtances, where the relevancy of the defence to exclude or elide the libel preſſed hard on the Court. On ſuch occaſions, they themſelves took a proof of the defence *per ſe*, and they diſmiſſed the libel if the proof turned out to their ſatisfaction: if otherwiſe, they then and no ſooner remitted the libel ſimply to an aſſize, to be tried by them on the evidence for the proſecutor only. In this courſe, as they conceived, they ſaved their rule of not admitting contrary proofs in the ſame proceſs; for here the trial was divided, in a manner, into two diſtinct acts, which took place before different Judges. Among other inſtances, this expedient was employed on the libel againſt Reid and Lindſay, which was for theft and reſet of theft. The pannels maintained, that they ſtole not the goods, nor ſecretly reſetted them, knowing them to be ſtolen; but bought them publicly, *bonâ fide*, and at an equal price; and that they could not therefore paſs to the knowledge of an aſſize. "The Juſtice-depute declares, that "befoir they give and pronounce their interloquitor, they "will tak the depoſition of the defender's witneſs, and there-

July 9. 1662.

[1] Mackenzie expreſſes himſelf to the ſame purpoſe in another paſſage, as follows: "When witneſſes are led in an exculpation, they ſhould preſently de-"pone, and the Juſtices ſhould be Judges to what they depone, and it ought not "to be remitted to the aſſize; becauſe, *non conſtat*, till the probation be led and "adviſed, whether the exculpation be excluſive of the libel or elides it; and ſo "the libel cannot go to an inqueſt, as was found, after much debate, in Barclay's "caſe." Part 2. tit. 22. No. 8.

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" fore and for certaine uther cauſes moving them, continue " this diet till the morrow." This charge does not ſeem to have been proſecuted to any farther iſſue. But it was otherwiſe in

Nov. 18. 1667. the caſe of Archibald Borthwick, who being accuſed of deforcing a meſſenger in the execution of a poinding, defended himſelf on this ground, that the debtor was his tenant, and owed him a year's rent, for which he had applied his hypothec to the goods in queſtion, and had made intimation thereof to the meſſenger, poinder. Now this plea the Court found relevant [1], if proven, to elide the dittay; and having taken a proof of it, they accordingly " fand the defence proven to " eleid the dittay, and in that reſpect fand the dittay ought " not to paſs the knowledge of an aſſyſe; whereupon the fore- " named perſons, pannels above written, and their faids procu- " rators, aſkit and took inſtruments, and proteſted for relief " of their cautioners, whilk the Juſtices admitted." Again,

June 18. 1667. in the trial of William Sommerville for uſury, he offers to prove by the oath of William Stewart, the party alleged to have been wronged, that the diſcharge libelled on as uſurious was not granted on payment of money, nor for any onerous cauſe. Stewart depones to the contrary before the Juſtice; and then and no ſooner an aſſize is named to take cogniſance of the libel. A ſtill more prepoſterous courſe of inquiry, ſeems to

Aug. 23. 1662. have been taken on the libel againſt Andrew Thomſon and John Edmiſton, who were accuſed of the theft of certain kine. The Juſtice, without ſwearing an aſſize, takes the depoſitions of ſome of the proſecutor's witneſſes; finds that the kine are his, and ordains them to be reſtored to him; but remits

[1] " The Juſtices find the defence and duplyes, as proponed be Sir George " Lockhart for the pannels, relevant (if proven) to eleid the dittay, as the ſame " is proponed."

remits to the Magiſtrates of Stirling to inquire whether the pannels bought them in open market[1], and aſſoilzies the pannels in caſe this ſhall be found to be the fact.

The old rule as to contrary proofs laid aſide.

THESE ſtrange and unſeemly proceedings, ſhowed ſufficiently that there was ſomething unſound in the doctrine that gave occaſion to them. Which coming to be at length felt in practice, notwithſtanding the old prejudice in favour of ſuch a rule, it was by degrees encroached on, and came in the end to be utterly exploded. This, however, did not happen at a very diſtant period; and the faſhion remained of citing the maxim at the bar, for a while after it no longer had a favourable reception with the Court. It was found to be a good reply in the caſe of William Scott, *alias* Laidly of Moſphennan, on the 18th February 1712[2]. It was pleaded at large, in the trial of James Maxwell of Arkland, in June 1721; and, in that of John and William Smith, in March 1732. The firſt inſtance, as far as I have obſerved, where the proſecutor openly gives up the point, and admits the propriety of allowing a joint proof to both parties, is the caſe of Macadam and Long, in December 1735; but even after that time, the topic was occaſionally.

1 "The Juſtice depute fand, and be thir preſentis finds, That the kowis be-
"longs to the perſewar, and ordains them to be delyvered to him, or any have-
"ing his powar: and ordaines the provoſt and baillies of Stirling, to tak tryall
"of the goods, if they wer bought in ane publick mercat; quilk being proven,
"the Juſtice aſſoilzies the defendars fra any criminall perſuit, and ordaines
"them to have cautione for the pryces of the goods, and their prejudice as fore-
"ſaid."

2 "And repell the haill defences made for the pannels, as being contrary to
"the libel, and remit," &c.

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ly, though more ſlightly touched on by counſel in their pleadings.

Allowance of the pannel's proof.

BESIDE this object, the pannel had to accompliſh ſtill another, no leſs material to his cauſe: I mean the obtaining of a proof at large, of all allegations which might be anywiſe conducive to his advantage, inſtead of being limited, as by the practice in the earlier part of this century, to certain facts and circumſtances only, which were deſcribed in the interlocutor of Court, and found relevant in a ſpecific ſhape and form, as there ſet down: A limitation which muſt often have embarraſſed and unduly circumſcribed him in his defence. The allowance of a greater latitude in this reſpect, was a natural and almoſt unavoidable conſequence of the more general ſtyle of indictment and interlocutor on the matter of art and part, which began to be revived in 1720. If the proſecutor might ſupport his charge, with a proof of all pertinent facts and circumſtances whatſoever, though in nowiſe declared or communicated in his libel; it was reaſonable, or rather indiſpenſable, that the pannel, on the other ſide, ſhould have the equal freedom of meeting, and oppoſing him at all points, with a proof of all favourable circumſtances in his own behalf. Accordingly, there followed an alteration of practice in this article, at no great diſtance of time after the other; and inſtead of having a ſpecial ſtate of facts ſuſtained to him, and to a preciſe and limited effect, the pannel came to be allowed a proof at large, "of all facts and circumſtances which may tend to "exculpate him, or to alleviate his guilt, of the crime char-"ged againſt him." It is true, that this broad ſtyle of interlocutor was not ſettled at once; and Maclaurin has quoted caſes in which a more reſtricted phraſe was uſed, as late as 1740. In truth, there are inſtances of the ſame kind, of even a later date:

Introduction, p. 26.

date: But ordinarily, the interlocutor iſſued in theſe or the like terms, even before 1740; and now it is never in any other.

Limitation of the pannel's proof.

YET ſtill, broad as theſe terms are, they do not beſtow the abſolute privilege on the pannel, of detaining the Court and jury to no purpoſe, with a proof of every thing he pleaſes, how foreign and impertinent ſoever to the iſſue. This limitation is expreſſed in the very words of the interlocutor, that the facts which are to be proved, muſt be ſuch as tend either to exculpate the pannel, or to alleviate his guilt: If they have no ſuch tendency, they are not within the latitude allowed in the judgment, great as it is; and the queſtion concerning any circumſtance, whether it has or has not this tendency, is one which muſt always be ſubject to the opinion of the Court. On finding, therefore, that the pannel's interrogatories wander from the caſe, the Judge will oblige him to explain his purpoſe, and if he find them quite impertinent, will oblige him to deſiſt. Juſt as on the other hand, the Judge will control the proſecutor alſo, though by ſtatute allowed a free range in his proof of art and part, if he appear to be encumbering the caſe with uſeleſs or irrelevant matter. The pannel's advantage in the modern form of interlocutor, lies therefore here, and is moſt ſubſtantial; that he has a proof of all circumſtances, ſuch as are anywiſe pertinent to the iſſue, or conducive to his defence, without a previous ſpecification of the particulars, or any limitation of the terms in which they may be ſerviceable to him, or of their effect in caſe they ſhall be proved.

Relevancy muſt be found in every proceſs.

So much ſhall ſuffice touching the form and matter of the interlocutor of relevancy. Which in every proper criminal proceſs,

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ceſs, without exception even of thoſe in the inferior courts, is an indiſpenſable ſtep of the proceedings. In civil caſes, it is not uncommon to ſend a libel, or a condeſcendence of facts to proof, *before anſwer*, as it is called; that is, without any previous aſcertainment of the concluſion to be drawn from thoſe facts, if they ſhall be found to be true. But this way of proceeding is not ſo ſuitable to a criminal proſecution: wherein, as it is attended with riſk and diſcredit to be remitted even to an aſſize; ſo it is unfit that any one ſhould ſuffer this diſtreſs, unleſs there be a charge on record againſt him, which *ex facie* at leaſt is regular and concluſive. Therefore, in a proceſs of advocation at inſtance of William Brown, complaining of a ſentence of the Sheriff of Mid-Lothian, the Lords found "that the interlocutor of the Sheriff allowing "a proof before anſwer was irregular, as a relevancy ought "to have been found before going to proof." For that reaſon, they remitted to the Sheriff, with an inſtruction to diſmiſs the proceſs.

Mar. 19. 1783.

Interlocutor of relevancy is irreverſible.

As this ſort of interlocutor is a neceſſary, ſo is it alſo by our cuſtom a final and irreverſible ſtep of proceſs, which cannot be reviewed or altered on petition, or other form of complaint; being given, in all caſes of any difficulty, on mature deliberation, and with the benefit of a written and recorded debate, wherein the parties have full opportunity to enlarge on every thing that may be material to their cauſe. I ought however to mention, that while ſpecial interlocutors of relevancy continued to be uſed, whereby this act of proceſs was of more particular importance, and far more difficult alſo to be correctly drawn than it is now, it did ſometimes happen, that on farther debate, or in conſequence of new allegations, a ſecond interlocutor of relevancy

cy was given, in ſupplement or explanation, and ſometimes in confirmation, of the former; for I have not obſerved any one, which can juſtly be ſaid to be in reverſal. This happened in theſe trials: that of William Barclay, November 12. 1668; that of William Lowrie, January 31. February 5. 1683; that of Macleod of Aſſint; that of Alexander Gordon, Robert Keith and others; that of Captain Wallace, where a debate took place on the competency of this ſort of review [1]; and in the trial alſo of the Darrachs, in 1725, on their giving in an additional defence, or new qualification of their plea of *alibi*. Likewiſe, in the trial of Enſign Alexander Hardie, after judgment on the informations of parties, the pannel entered into a new courſe of exculpation, which, and certain anſwers made thereto, were the ſubject of an additional interlocutor.

Feb. 2. and 16. 1674.

July 31. Aug. 3. 1691.

Aug. 4. and 5. 1692.

Oct. 1. 1725.

June 16. 1701.

What, if a point of civil right is involved in the trial.

BEFORE cloſing this chapter, I ſhall take notice of another courſe of proceeding, not uncommon formerly, but of which I find no inſtance in the practice of later times. I am now ſpeaking with reference to thoſe caſes, which involve the deciſion of ſome point of civil right. Of old, in ſituations of this ſort, our Criminal Court, either conceiving that it did not lie within their province to determine, even incidentally, on controverſies of this ſort, or on account of the difficulty of reducing the proof of ſuch matters within the due bounds of a trial by jury, had recourſe to two ways of obviating the inconvenience. In ſome inſtances, inſtead of delivering an interlocutor of relevancy, they continued the diet until the civil intereſt ſhould be ſettled in the proper Court; or they

[1] In the trial of Toſhoch for fire-raiſing, a new debate was allowed to take place after the interlocutor of Court, refuſing to remit the pannel to an aſſize. And the Court gave a ſecond interlocutor, adhering to the former. June 13. 21. 25. 1634.

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ſtraightway remitted that matter to the Court of Seſſion, in order to the deciſion of it there. In other inſtances (and this ſeems to be a more exceptionable courſe) the Juſtice proceeded to the trial, hypothetically, on the caſe as ſtated for the proſecutor, and remitted the libel to an aſſize, and received their verdict, but here ſtopped ſhort; ſuſtaining the point of civil right as a reaſon for ſiſting proceſs, till that intereſt were brought to an iſſue in the proper Court: whereby, if the event of the civil controverſy were in favour of the pannel, the verdict became fruitleſs, and the hypothetical conviction was ſet aſide. This expedient was employed in the caſe of William and Alexan-

Aug. 4. 1663. der Gordon and others, indicted at inſtance of Boyd of Penkill and others, for hameſucken and oppreſſion, in entering and taking poſſeſſion of their houſe, and of the goods ſituated therein. The pannels plead, that they entered to poſſeſſion in virtue of letters of ejection, and committed no violence, other than is uſual and neceſſary on ſuch occaſions. The proſecutor objects to the ſaid letters as irregular and informal. "The Juſtice-depute ſuſtaines the dittay to infer "the puniſhment due to injuar, wrong and oppreſſione, and de-"claires they will tak conſideratioune of the pannelles defence, "aftir probatioune is led and verdict given, whether ſen-"tence ſall be ſyſted till the diſcuſſing yrof before the Judge-"Ordinary, or not." In like manner, on the libel againſt

July 29. 1663. Mackenzie of Suddie, elder and younger, relative (among other things) to the burning of the proſecutor's peats and fuel in the field, but which fuel the pannels ſaid was their own, and had been caſt from their own lands, "the Juſtice declaires, that "as to the feual he will tak conſideration, not only whither "the perſons did caſt the peitis, but alſo whither the moſs "perteined to Suddie, and if he was in uſe to caſt formarlie

"without

"without interruptione." And after receiving the verdict, he ſuperſedes ſentence as to this article of the charge, "unto "ſuch tyme as the poynt of propertie and poſſeſſion be diſ- "cuſſit civillie befoir the Judge-Ordinar, and that it be tryit "befoir them which partie had beſt right, and who had "done wrong." Perhaps it was with ſome ſuch view, that the following interlocutor was given in the caſe alſo of Robert Macbrair, Charles Durhame, and others, whoſe defence turned on the right of their maſter to certain woods, and on a tolerance which they had got from him to cut them. "The "Juſtice declaires they will tak probatioune both for pro- "ving the dittay and defence, and *will conſidir the ſamin aftir* "*the verdict.*"

Aug. 4. 1663.

July 11. 1664.

What, if a point of civil right is involved in the trial.

THE other courſe of trial, by remit to the civil Judge, was taken on numerous occaſions. Ferguſon, Don, and others, being purſued for theft or reſet of twelve oxen, the Juſtice, after hearing parties, delays the trial till the purſuer ſhall diſcuſs the matter of right, in an action of reſtitution or otherwiſe. The like in the caſe of William Dalzell, and others, where the pannels plead on their right by the maſter's hypothec, and a previous poinding[1], in exception to a libel for deforcement. A more noted inſtance, is the caſe of Innes of Dunkinty, and others, who were indicted in 1712, for intruſion into the Little Kirk of Elgin. The pannels laid their defence on this fact, that the building ſo named was not properly a part of the pariſh kirk, but a diſtinct building, and applied occaſionally to profane uſes: "The Lords, &c. re- "mit

June 16. 1663.

Nov. 26. 1675.

July 18. 1712.

[1] "The Lords continues this dyet, untill the laſt Monday of July next to "come; that in the mean time, the pairties may diſcuſſe the civill intereſt be- "fore the Judge Ordinar," &c.

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" mit to the Lords of Council and Seſſion, to be determi-
" ned by their Lordſhips, the libel and cauſe, in ſo far as
" concerns this prejudicial queſtion and point of right, viz.
" Whether or not the place called the Little Church of El-
" gin, now poſſeſſed by the Epiſcopal miniſter, be a pariſh
" church, or part of the pariſh church of Elgin; and recom-
" mend to the ſaid Lords of Council and Seſſion, to diſcuſs
" the ſame ſummarily, without abiding the courſe of any
" roll; and continue the diet as to the criminal part of the
" libel, until the 28th day of July." That matter was tried accordingly in the Court of Seſſion, who found, that this building was a part of the pariſh kirk; upon which narrative [1], the Lords of Juſticiary afterwards gave out their interlocutor of relevancy on the libel. Meanwhile, an appeal had been taken to the Houſe of Lords, from the decree of the Court of Seſſion, on the matter of civil right; and this in the end, was followed with the reverſal there, of the ſentence of both Courts: For the pannels having been convicted, and fined in the Court of Juſticiary, this judgment alſo was brought under review by appeal; which, in theſe peculiar circumſtances, was received, and proved ſucceſsful.

Feb. 9. 1713.

Feb. 24. Mar. 2. 1713.

I HAVE not obſerved any more recent inſtance of this dilatory courſe of proceeding. And that no ſuch delay would now be

1 " By which ſentence, it is found proven, that the place called the Little " Church of Elgin, is a part of St Giles's Church, the pariſh church of Elgin, and " that, both in times of Epiſcopacy and Preſbytery, the ſaid Little Church has " has been made uſe of for divine ſervice, and not proven that the magiſtrates of " Elgin have employed the ſame for any other uſe, excluſive of the biſhop and " miniſters their uſing and poſſeſſing thereof."

be reckoned neceſſary, may fairly be inferred from what happened in the late trials for perjury in taking the freeholder's oath of truſt and poſſeſſion: For, on all thoſe occaſions, the whole matter was immediately remitted to an aſſize, though depending in a great meaſure on a queſtion of civil right, and this, too, none of the eaſieſt to be inveſtigated or decided.

CHAP-

CHAPTER XI.

OF THE ASSIZE.

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No deſertion of diet after ſwearing the aſſize.

WE have now advanced to that period of a criminal proceſs when it aſſumes a new ſhape, and is in ſeveral reſpects materially altered in its nature, by the naming and ſwearing, or as we call it *ſetting*, of the aſſize of fifteen perſons, who are to paſs on the trial of the priſoner. In particular, that ſtep is attended with this change in the condition of the proceſs, that the proſecutor no longer has it in his power, for any reaſon, to obtain a deſertion of the diet, but muſt let his intereſt take its fate with that libel, and in the condition of things at that ſitting, ſuch as they chance to be. Until then, and even after interlocutor of relevancy, the proſecutor, on good cauſe ſhown for it, may ſtill be allowed to deſert the inſtance *pro loco et tempore*, and ſave his right of inſiſting anew, at a more convenient time, and on another indictment. It may happen, that he even at this period makes diſcovery of ſuch circumſtances, as render it unfit, or perhaps impoſſible, for him immediately to proceed with the trial: New facts may come to light; new

new witneſſes may be found; a material witneſs may be abſent; or blunders may be obſerved in the execution againſt witneſſes, or in the copies of the liſts of witneſſes and jurors; and of all ſuch diſcoveries it is reaſonable that he have the benefit, as long as the caſe is in its ſtate of preparation only with the Court. This point was ſettled accordingly in the caſe of Archibald in 1768. But if an aſſize have once been ſworn, this freedom is properly, and indeed neceſſarily, at an end. The libel and the pannel are thenceforward in the hands of the aſſize; to whom, by the act of the Court, they ſtand finally remitted for the purpoſe of an immediate determination of his guilt or innocence; whereby all the powers of the Court over the inſtance, farther than relates to that one object, are finiſhed and exhauſted. I need not ſay how indecent and how unjuſt it would be, if the proſecutor could deſert his libel, on the naming of an aſſize not compoſed according to his wiſhes.

Maclaurin, No. 81.

AT this ſtage of the buſineſs, I propoſe therefore, to take notice of all thoſe particulars which relate to the aſſize: the number who officiate, the manner of their citation and appointment, the qualifications of the perſons, and the like.

WITH reſpect to the number of jurymen who ſhall be put into the liſt, and be ſummoned on any libel; we have thus far an abſolute rule, in the ſtatute 1579, c. 76., that they ſhall not be more than forty-five. The purpoſe of which proviſion, as we are told in the ſtatute, was, to guard againſt a frequent malverſation of the officers of the law [1]; who, in colluſion

Number of jurors on the liſt.

[1] On the 13th January 1630, Alexander Maitland, and James his ſon, meſſengers, enact themſelves, "that they ſall nawayis tak ony money or uther guid "deed

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luſion with the private parties, purchaſers of criminal letters, made up a numerous and unreaſonable roll of aſſize, and afterwards took money from the moſt ſubſtantial of them, to ſtrike out their names: whereby it ſometimes happened in the end, that none but mean and incapable perſons (*his Hieneſſes pure commons*, as the ſtatute calls them) remained on the roll, when it came to be reported in Court. A later ſtatute, 1587, c. 89. confirmed that rule, and with this additional proviſion, that the officer ſhall not "put out nor put in "the ſaids roll, ony perſons, for gratitude or gude deed," under pain of being puniſhed, "as common oppreſſors, to the "death." The purpoſe of citing ſo many as forty-five jurors, is in favour of the proſecutor [1]; that he may be ſure of the attendance of a ſufficient number of competent and unexceptionable perſons, to paſs on the trial. And therefore, in more than one inſtance, it has rightly been found not to be a good objection on the part of the pannel, that the roll is ſhort of that ordinary number. This was the judgment in the caſe of Enſign Hardie, where the record informs us generally, that not ſo many as forty-five had been cited; and in that of William Carruthers, where the liſt ſeems to have conſiſted

June 9. and 16. 1701.

Oct. 19. Nov. 1. 1731.

"deed fra pairties indyttit, or perſones to be ſummond upon aſſyſs, nor compone "with thame to ſtay or byd at haime in ony tyme cumming." This, in reſpect that the Lords of Secret Council had remitted their puniſhment for the time bygone; a very ineffectual way of correcting ſuch offences.

[1] Lord Royſton obſerves, at p. 246. "It is from a miſapprehenſion of this "act, that no more than forty-five are ſummoned in Circuit Courts, whereas, it "only relates to diets before the Juſticiary Court. And ſurely, forty-five are "too few to ſerve in Circuits, where there are often many cauſes tried; which "therefore ſhould be rectified. Accordingly, there were ſixty ſummoned to "attend the aire at Inverneſs, in May 1738."

siſted of forty-four. Still leſs, therefore, is it a good objection, that ſome of the forty-five perſons in the liſt have died, whether before ſummoning the aſſize, as in the caſe of William Wyllie, or in the interval between citation and the time of trial, as in the caſe of Joſeph Watſon.

Mar. 1. and 13. 1733. June 30. July 21. 1707.

Liſt of aſſize, how made up.

It appears from the ſtatute above mentioned, that by the cuſtom of that time, the proſecutor, public or private, had the entire truſt of making up the liſt of aſſize; which the meſſenger was to receive from him, ſigned with his hand, and was to annex, uncancelled and unaltered, to the end of his execution. But, of this, certainly moſt improper, privilege, he was deprived, by the regulations of 1672, which order, "That the perſons to paſs upon aſſiſes be liſted, and their "names and deſignations inſert in ane roll, to be ſigned by "the ſaid Judges or their quorum." Whether a quorum of the Court are to make up, as well as ſign the liſt, the ſtatute does not poſitively direct. By Act of Adjournal of 13th November 1690, it is however appointed, that the liſt ſhall be made up by the Clerk of Court, at the ſight of one of the Lords. But in the practice of later times, this duty has been committed to the clerk alone, who takes the aſſizers, in rotation, from his general liſt of the perſons who are liable to be called on for this ſervice. Formerly, while the proſecutor had the choice, the jurymen were taken generally from the vicinage of the pannel's reſidence, or of the place where his crime had been committed, how diſtant ſoever this might be from the place of trial. But they have now, for long, been appointed without any regard to that qualification.

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Warrant to cite aſſizers.

THE warrant to ſummon the aſſize, in caſe of proſecution by criminal letters, is in the will of the letters themſelves: If the proſecution be by indictment, it is in letters of diligence under the ſignet of Court. In either caſe, the liſt of aſſize is ſeparate from the libel and warrant of citation.

Manner of citing aſſizers.

TOUCHING the manner of execution againſt the ſeveral aſſizers; mention may be made of the Act of Adjournal of the 20th July 1674, which commands the macer or officer of the law to exhibit the ſigned liſt of aſſize to each perſon, at the time he cites him[1]. This, I preſume, by way of ſecurity againſt the officer, who might pretend a warrant to ſummon certain perſons, and take money to himſelf, for excuſing them from the ſervice. But I doubt whether this direction has been ſtrictly obſerved in the practice of later times. It is, however, implied in this ordinance of Court, and indeed it plainly regular in itſelf, that the officer who ſummons the aſſize ſhall at leaſt be poſſeſſed of the liſt and warrant of citation, or a lawful extract of them, and have them with him, at the time of proceeding in the execution of this part of his duty. Such a queſtion was ſtirred on the libel againſt John Watſon and others; but the caſe was withdrawn before judgment, by compromiſe among the parties. The citation of an aſſizer, like that of a witneſs, ſeems to be equally good, whether it be given perſonally or at his dwelling-place; though a practice had prevailed at one period, but has ſince been properly diſcontinued, of exacting the unlaw, which is one

Jan. 27. and Feb. 1735. Record, p. 544, 545.

[1] "The ſaid day, the Lords ordained the meaſers of Court, in all tyme co-"ming, where they ſummond any aſſize, to exhibit to ilk aſſizer the ſubſcrybed "roll, wherein the aſſizer's name is, otherways they ſhall not be holden to an-"ſwer at the dyett, nor unlawed for abſence."

one hundred merks, from thoſe jurors only who had contemned a perſonal citation. In point of time, it does not afford the pannel any ground of exception, how ſhort the *inducię* which have been allowed the aſſizers: Though it may be otherwiſe in the queſtion of unlaw with ſuch of the aſſizers themſelves as are abſent; if they have not got reaſonable notice of the call on them, ſo as to be ready for the ſervice.

Execution of citation of aſſizers.

As in other caſes of citation, the officer has to verify his performance of his duty, in a written report or execution on the fact. And in regard to this, contrary to what is obſerved in the citation of the pannel, it has been our uniform cuſtom to have reliance on the hand and affirmation of the officer alone, not confirmed with that of witneſſes. Alſo, when challenged, this practice has received the ſanction of judgments; firſt in the caſe of Margaret Stuart, and again in that of Barbara Coutts. It was pleaded on thoſe occaſions, that the act 1686, c. 4., which regulates this matter in the caſe of parties, has no relation to aſſizers, who are not cited, properly ſpeaking, to *appear before a Judge*, (which are the words of the act), but rather to form a court, and act as judges themſelves; and farther that theſe things are the concern of the aſſizers alone, and touch not the pannel, if he has been regularly ſerved with his copy of the liſt. Agreeably to theſe views, the execution is held to be good, and ſufficient to enforce attendance, if it mention generally the way in which the ſeveral aſſizers are cited, whether perſonally or at their dwelling-places; though without ſetting forth the ſpecial manner of leaving the copies, or naming the perſons with whom. Such an objection was overruled in the caſe of Walter and George Boſwell, 16th and

Mar. 15. and 22. 1743.
July 21. and 30. 1746.

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23d December 1728 [1]. In the caſe of Wyllie and Strang, it was pleaded for Strang, that the aſſizers had not been ſummoned to his trial, but to that of the other pannel only; in as much as the charge, as ſet forth in the execution, was to paſs on the trial of Mr William Wyllie, &c., without engroſſing the objector's name. This plea was unſucceſsful: It appeared on inquiry, that ſuch had been the cuſtomary ſtyle of execution, and that it was the ſtyle even of the warrant itſelf of citation, in caſes of this ſort.

Mar. 1. and 13. 1733.

Number and choice of the aſſize.

THESE things relate to the great aſſize of forty-five perſons. Next, of what concerns the ſelect or leſſer aſſize, who are named to paſs on the trial of the pannel. Of theſe there are now never appointed more nor fewer than fifteen; though in older times, the number ſeems to have varied occaſionally, from nine to ſeventeen [2].

No peremptory challenge of aſſizers.

THEY are named by the preſiding Judge, from the roll of forty-five; and are preſented, five by five, to the pannel, who is aſked if he have any objection, why they or any of them ſhould not paſs on his aſſize. As to which, our cuſtom allows him not that freedom which the priſoner has in England, of ſetting

[1] The eſtabliſhed practice is, that the execution divides the aſſizers into two columns, as cited perſonally, or at their dwelling-places, but without any ſpecification of the mode of leaving the copies for the latter.

[2] On the trial of Thomas Hutchine for ſlaughter, Feb. 23. 1558, there ſat an aſſize of eleven; (See the MS. Abridgment; no record in the Advocates' Library). Thirteen ſat on the 2d Dec. 1615; thirteen on the 22d June 1622, and 23d July 1623; ſeventeen in one trial, and nine in another, on the 26th May 1586.

ſetting aſide ſo many of the jurymen by a peremptory challenge, or without aſſigning any cauſe of diſlike, but obliges him to ſpecify with reſpect to any one whom he challenges, ſome lawful and juſt exception why the man ſhould not be truſted on ſuch an occaſion. This, at all times, has been our uniform and unqueſtionable practice; and I cannot, therefore, but think it ſtrange, how Sir George Mackenzie, in his Vindication of Charles II., ſhould have affirmed, that there paſſed in that reign [1], nay that he himſelf ſolicited and obtained, a ſtatute, indulging the pannel with a peremptory challenge of the jurors to the number of thirty: a ſtatute of which there is no where any trace or veſtige, ſave in that author's own aſſertion.

Lawful objections to aſſizers.

TOUCHING the lawful grounds of objection to an aſſizer, it will not be neceſſary to diſcourſe very much at large. It is ſuch in the firſt place, if he be an infamous perſon; meaning by this, one who is ſo *infamiâ juris:* or if he be an outlaw, who has no character in law even to defend himſelf againſt any proſecution for his crime, and much leſs to determine on the guilt or innocence of another. Such, probably, it alſo is, though in this I have found no precedent to guide me, if the juryman be at enmity with the pannel; that is to ſay, if he ſtand in ſuch a ſituation with regard to him, that he cannot but be ſuppoſed to bear him ill-will, as having ſuffered ſome grievous injury at his hand; or if his malice have

[1] "And though of old the King's Advocate had the naming of the jury, as "being preſumed diſintereſted; yet, Sir George Mackenzie prevailed to get an "act of Parliament, whereby the nomination of the jury was referred to the "Judges. Fifteen of theſe forty-five only are admitted as a ſufficient jury, and "the defendant is allowed to challenge or reject, without giving any ground or "reaſon for it, any thirty that he pleaſes of that number, and the fifteen who re-"main make up the jury, and are ſet by the Judges." See Mackenzie's Works, vol. ii. p. 352.

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have broken out in evil deeds to the pannel, or even in very ſtrong expreſſions of hatred or revenge: For the ſame rule will not apply here as in the caſe of witneſſes, for whom no ſubſtitutes can be found. Again, it is certainly a good objection to any one on the liſt, that he is inſane, or deaf, or dumb, or a minor; for the law cannot think it fit to truſt any one with the high privilege of deciding on the moſt important intereſts of his neighbour, whom it has not truſted even with the free adminiſtration of his own private affairs. This rule was applied in the caſe of Menzies; where a minor having ſerved on the aſſize, and this diſcovery not being made till after the verdict was returned, the whole proceedings were in conſequence annulled. The like exception had been ſuſtained in two caſes of an older date: in the trial of George Milne for demembration [1], where Maurice Sked was ſet aſide on that account; and in the trial of William Gill, where minority was objected to David Wallace [2]. In one inſtance, and but one ſo far as I have obſerved, the law had been carried even farther, to the diſqualification of a perſon who was under twenty-five years of age. This was in the trial of Mathew King, for ſlaughter. "It is allegit againis "Gabriel

Nov. 29. and Dec. 13. 1790.

Feb. 27. 1618.

June 8. 1615.

June 8. 1616.

[1] "It is alledgit that Moreis Sked cannocht paſs upone this aſſyſs, becaus he "is nocht of lawful aige, at leaſt is not twenty-five yearis compleit; whilk being "referrit to Moreis Sked his aith, declareit that he would be twenty-one years "come Guid Friday, quhome the Juſtice yrfoir repelleit."

[2] "It is allegit be the pannell, that David Wallace in Hadingtoun, cannocht "paſs upone his aſſyſſe, becaus he is bot ane boy within age, nocht paſt twenty "yeiris.

"The Juſtice, in reſpect of David Wallace's declaratioun of his age, ordainis "him to ſtand by."

Theſe precedents were not laid before the Court in the caſe of Menzies.

"Gabriel Holme in Kilmauchline, that he cannocht be ad-"mittit, in reſpect he is within age, nocht paſt twenty-five "years.—The Juſtice repellis him in reſpeict of his age, being "not paſt twenty-five yiaris." Whether this be truly our law, might have been ſettled in the above-mentioned caſe of Menzies, where beſide the minor, other two perſons had ſerved on the aſſize, both of whom were under twenty-five years of age; but on this objection the pannel did not much inſiſt, and the Court thought it unneceſſary to determine, in the circumſtances of that caſe. I think, however, it may fairly be argued, that in this matter, as in that of bearing the office of tutor-at-law, either a ſpecial ſtatute, or old and invariable uſage, is requiſite to diſqualify a perſon who is of perfect age as to all other functions and privileges, and capable even, as a magiſtrate, of holding criminal juriſdiction. And indeed I obſerve in the record what may be conſidered as in ſome meaſure a deciſion to that effect. It is a petition on the part of Trotter of Mortonhall, praying for remiſſion of a fine which he had incurred as abſent from an aſſize, and wherein, among other reaſons, he ſets forth that he is under twenty-five years of age, and therefore not liable to ſerve. Now, the Court refuſed the deſire of this petition, and ordained horning to paſs againſt him for the fine, if not paid within twenty-four hours.

July 28. 1701.

In the caſe of proſecution at a private inſtance, it is a lawful objection to any juryman, that he is near of kin to the accuſer. But as to this article, it may be ſomewhat difficult to determine upon any evidence in the Books of Adjournal, how far the excluſion goes; whether to the ſame degrees of kindred which have been fixed by ſtatute in the caſe of Judges, or to ſome nearer degrees only. On the one hand, for

Objections to aſſizers. Near relations.

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for many years, and indeed from the inſtitution of the preſent Court in 1671, when the liſt of aſſize came to be made up under the ſuperintendence of the Judges, there has been no one opportunity of deciding on any objection of this ſort. And on the other hand, in the ſtate of our older practice, while the proſecutor was truſted with the compoſition of that liſt, our Judges were juſtly far more ſcrupulous in this article, than there would be any reaſon for now, in the altered condition of the country, and according to the way in which the ſelection of jurymen has ſince been conducted. It was nothing unuſual formerly, to have an aſſizer rejected, or ordained *to ſtand aſide*, as the ſtyle for it was, becauſe he, or perhaps his wife, was ſecond or third couſin [1], *ſeconds* and *thirds* as they called it, to the purſuer.

Objections to aſſizers. Dependence on purſuer.

For the like reaſons in the ſtate of our ſociety and manners, which had ſuggeſted ſo anxious an attention to that article, our Judges were formerly in the uſe of weighing all thoſe other circumſtances in the ſituation of an aſſizer, which might tend in anywiſe to bias his voice, or beget an undue favour to the proſecutor's cauſe: as that he was the proſecutor's tenant, eſpecially if he were removable at the pleaſure of his landlord [2]; or that he was ſervant or attendant in any ſhape, to any of the proſecutor's near relations. In later times, I find no

[1] In the caſe of Hew Croſbie, July 20. 1616, Roger Kirpatrick was ordered to ſtand aſide, as *threidis* to the purſuer; as was Fadzean of Newton, becauſe his wife was *ſecunds* and *threids* to the purſuer. Criſtopher Horne was rejected as thirds to the purſuer, "or at leaſt within degreis defendand," in the caſe of George Mylne, Feb. 27. 1618.

[2] See the caſe of Maxwell of Gerrarie, Dec. 15. 1619, for various objections of this character.

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no mention made of any plea of this complexion; unleſs it be in the trial of Joſeph Gerald, who being proſecuted at inſtance of his Majeſty's Advocate, for ſedition, abſurdly objected to the naming of William Rankine, his Majeſty's tailor, for one of his aſſize. Mar. 13. 1794.

Objection to aſſizers. Indigence.

In the older Books of Adjournal, frequent mention is made of another objection to aſſizers, of which alſo there is no inſtance in the practice of later times; I mean the low degree or indigent condition of the perſon. Thus, in the trial of William Gill, Archibald Kyle is ordered *to ſtand aſide;* having ſworn that he had no means of his own for the time, but lived at the charge of his mother, at whoſe death he was to have an heirſhip, the value whereof he knew not. In the ſame trial, Thomas Fairlie is admitted on his ſwearing that he is worth the King's unlaw, or L. 100 Scots, though he had recently been releaſed from gaol, on a decree of *ceſſio bonorum.* June 8. 1615.

Aſſize for trial of a landed man.

What I have now ſaid, naturally leads me to obſerve concerning the qualification of the aſſizers in point of rank, that ſomething depends on the rank of the pannel; for we in ſome meaſure pay regard to the maxim of trying a man by his peers, or perſons of a degree not inferior to his own. In this view, our practice ſeems once to have required, that the aſſize for the trial of a landed man ſhould all be men of that condition; and if he were a baron, or immediate vaſſal of the Crown, that at leaſt half of the aſſize ſhould be barons alſo. To which effect judgment was given after full debate, in the trial of Douglas of Spott, for the murder of Home of Eccles. May 9. 1667.

"The Juſtice findis the objectioun againſt the preſent aſſyſe "relevant, and ordeins the perſewars to ſummond ane new

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" assyſſe to the fourth day of June next to come, to which day " they continue the tryall of this actioune; the moſt part of " which aſſyſe to be of the Laird of Spott his owne qualitie, " viz. barouns holding of the King, and the reſt landit gen- " tlemen, holding either of the King or of ane uther ſup- " perior be chartir." In later times, without relinquiſhing the principle, our Judges have thus far conveniently modified the rule for ſuch caſes, that a majority only of the aſſize are landed men[1], and theſe indifferently, vaſſals holding of the Crown, or of a ſubject. To this extent the privilege ſtill maintains itſelf, as appears from the trial of Reid of Bara and Forbes of Barns, and that of Montgomery of Wrae; for on both theſe occaſions the diet was deſerted, owing to the want of a ſufficient number of landed men, to paſs on the aſſize. It is, however, only a proprietor infeft, and not the eldeſt ſon or heir-apparent of ſuch a one[2], that can lay claim to this diſtinction. Neither does it belong to every petty feuar or portioner in a village; and ſtill leſs to ſuch as are infeft for ſecurity only, or in ſome inferior intereſt to that of property. Alſo, in any caſe where the pannel is not commonly known for a landed man, it lies with him to ſupport his pretenſions to this honour, with immediate production of his infeftment. And the verdict is always good, though there

Nov. 15. 1703.
Feb. 20. 1716.

July 19. 1675, caſe of Fraſer.

[1] So ſays Lord Royſton in his Notes, *ad p.* 251. with relation to the caſe of Douglas of Spott, " So that according to this interlocutor, the major part ſhould " be real barons; yet, by the later practice it has been held ſufficient, that the " major part were landed men."

[2] " It was anſwered by Sir George Mackenzie, that they could not be re- " pelled from paſſing upon Kilbordie's aſſyſſe, becauſe he is no barron, but the " appeirand aire of an barron.—The Juſtice, in reſpect of the anſwer admitted " George Turnbull, baxter, and the other aſſyſſers, who are not landit men, to " paſſe upon Kilbordie's aſſyſſe."

there be no landed man on the aſſize, if, at naming them, the pannel have expreſsly waved his right; which is purely of the nature of a privilege, and under his own command to uſe or relinquiſh.

June 27. 1715, Sutherland. Jan. 31. 1791, John Lindſay.

Aſſize for trial of noblemen.

ACCORDING to certain old, but not very concluſive authorities[1], the ſame maxim was to be applied to the caſe of noblemen alſo, who were to be tried therefore by an aſſize conſiſting of perſons of their own high degree. But, although it often happened that noblemen were ſummoned to the aſſize on ſuch occaſions, as there was an obvious propriety in granting ſuch an indulgence where it could conveniently be done; yet it does not appear that we ever came to acknowlege an abſolute rule, of compoſing a nobleman's aſſize either entirely of noblemen, or even for the major part, but only of landed men. And indeed for long, and until the full eſtabliſhment of parliamentary repreſentation, the order of noblemen and other barons, or immediate vaſſals of the Crown, were truly one and the ſame, and therefore peers to each other in the ſtrict ſenſe of law. Thus, on the trial of Janet Douglas, Lady Glamyſs[2], for treaſon, only five noblemen ſat on the aſſize; on that of the Earl of Orkney, February 1. 1615, eleven noblemen ſat, and four landed men; on that of Lord Balmerino eight noblemen, ſix baronets, and one landed man; on

July 14. 16. 18. 1537.

Feb. 11. and Mar. 20. 1635.

[1] "*Statuit Dominus Rex, quod nullus debet recipere judicium, neque judicari, a minori perſona quàm a ſuo pari; ſcilicet, comes per comites, baro per barones, vavaſſor per vavaſſores, et burgenſis per burgenſes.*" *Quon. Att. c.* 67.; alſo, Skene on Crimes, c. 4. ſect. 3.

[2] In the trial of her ſon the Maſter of Glamyſs, four noblemen ſat; and in that of the Maſter of Forbes, one nobleman. July 1537.

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July 4. 1664.
Dec. 13. 1681.
Nov. 14. 1655.

on that of the Viſcount Frendraught, two noblemen only, Lord Blantyre and Lord Dunkeld; and on that of the Earl of Argyle four landed men, along with eleven noblemen. What is more expreſs; in 1655, the Earl of Traquair [1] having claimed a jury of noblemen, the Judges of that time found in ſubſtance, that the precedents which he appealed to were only in caſes of treaſon, and therefore repelled his plea in law; but *ex gratia*, appointed three noblemen to ſit on the aſſize along with the others, who were all of the degree of baronet.

Aſſize for trying a nobleman.

But it is needleſs to engage any farther in this inquiry; becauſe our ancient and native cuſtom, whatever it was, has been ſet aſide by a later and poſitive regulation, that which is delivered in the treaty of Union between the kingdoms of England and Scotland. It is there declared generally with reſpect to all peers of Scotland, "that they ſhall be tried as "peers of Great Britain, and ſhall enjoy all privileges of "peers, as fully as the peers of England do now, or as they "or any other peers of Great Britain may hereafter enjoy the "ſame." Now, the courſe of trial of a Britiſh peer in caſe of treaſon, or felony, or miſpriſion of either, is in a peculiar Court, the Court of the Lord High Steward (who is appointed for the occaſion), and which conſiſts of the entire order of peers [2] who have right to ſit and vote in Parliament. The manner too of finding the bill towards the trial of any ſuch treaſon or felony, when committed by any peer within Scotland, is regulated by ſtatute 6th Anne, c. 23.: which directs

[1] See MS. Abſtract of the Books of Adjournal, in the Advocates' Library; for there is not now extant any original record of 1655.

[2] Blackſtone, vol. 4. c. 19. ſect. 2.

rects it to be before a Bench of Juſtices, a ppointed by ſpecial commiſſion under the Great Seal, who are to take their inquiſition in the ſame manner as the Juſtices of *oyer* and *terminer* in England; that is, by a grand jury of twelve men, who may be commoners [1]. With regard again to inferior offences, not amounting to treaſon or felony, or miſpriſion of either; for theſe it appears that the law of England, except in ſuch inſtances where ſtatute has interpoſed, allows a Britiſh peer to be tried in the ordinary Courts of law, and by an ordinary jury of the freeholders of the county. Accordingly, with us, the Earl of Morton had his trial in the Court of Juſticiary, on a charge of aſſault, breach of the peace, and wrongous impriſonment, by a jury of which the higheſt in rank was a baronet, and only eight were landed men.

Mar. 4. 1740.

Objections to aſſizers. Trade and calling.

THUS much of the rank and degree of the perſons of aſſize. As to their callings or profeſſions; if the men be otherwiſe habile and duly qualified, they are hardly liable to challenge on account of any ſuch conſideration. Unleſs, perhaps, in the caſe of churchmen; with reſpect to whom, Preſident Balfour, in his Practics, has ſaid, and he confirms it with deciſions, "That nae ſpiritual or kirkman may perſonally "ſit in judgement, in any criminal action or blude, 25th "March 1519, 13th July 1517." Lord Haddington, in his MS. (*voce* Kirk), delivers the ſame doctrine. Sir Thomas Hope too, in his collection of deciſions, or Major Practics, takes notice of an unprinted act of 1475, relative to the forfeiture of John, Earl of Fife, which mentions, that doom was pronounced there, (agreeably to the practice of England in ſuch

P. 30. c. 33.

Tit. Juriſdiction of Kirkmen.

[1] Hawkins, book ii. c. 44. No. 15.; Hale, vol. 1. p. 374.

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Deciſions, July 28. 1680.

ſuch caſes), "*remotis omnibus Prælatis Parliamenti*[1]." Fountainhall, in like manner, mentions, that on occaſion of an inquiry concerning a charge of treaſon, "The biſhops in "this, as a ſanguinary caſe, retired forth of the Council." In fine, certain it is, that for theſe two centuries at leaſt, no churchman has been ſummoned to ſerve on any jury in a criminal caſe.

Exemptions from ſerving on aſſize.

May 6. 1562. Mar. 6. 1589.

THE ſame is true, though certainly for reaſons of a different kind, with regard to butchers; who were, however, in the uſe of officiating formerly: as appears in the trial of Wight and Ferguſon; and in that alſo of William Nicol, where four perſons, "*fleſhers in Edinburgh*," are of the aſſize, though the charge was for the murder of a brother of their trade in that city. It is not therefore a clear point, that by the bare diſuſe of calling them, they have come to be diſqualified, or have ſuffered a forfeiture of this part of their birthright; if on any future occaſion it ſhall be found proper to ſummon them, or if they, for themſelves, ſhall be diſpoſed to aſſert it. But, in certain inſtances, an exemption from this ſort of ſervice has been ſolicited and obtained, as matter of favour and convenience[2]. This is the caſe with the officers of

[1] Lord Royſton, in his Notes, *ad p.* 250., ſays, that there are ſeveral inſtances of the contrary between 1556 and 1558; I have not, however, been able to diſcover them in any record of that time, which is now extant.

[2] On the 1ſt December 1673, the Captains of the city of Edinburgh's guard, preſented a petition, claiming an exemption, which the Lords promiſed to conſider; but nothing appears to have been done. On the 4th October 1708, there is a petition from the burgh of Perth, which ſets forth, "That by one of the "burgh's charteris, the burgeſſes are exempted from paſſing on aſſize, except in "the trial of crimes done within a mile of the burgh, and craves inſtructions to "the Sheriff not to ſummon them." This petition was remitted to the Lords upon

of his Majeſty's mint; who enjoy ſuch an immunity by charter of 1687, to which effect was given on the claim of William Brown, on the 6th July 1713. Alſo, by Act of Adjournal of 17th March 1674, the Lords prohibit all meſſengers and officers of the law, to ſummon to aſſizes in criminal caſes, any ſurgeon inhabitant of a burgh, and admitted to practice after trial of his qualifications before the ſurgeons of Edinburgh. This act proceeds on a charter of Queen Mary [1], 11th May 1567, ratified under the Privy Seal, by James VI., on the 6th of June 1613, and by act of Parliament in 1670.

Objections to aſſizers. Miſnomer.

LAST of all; it is a good objection to any one, how well ſoever he may be qualified for the office, that he is not one of the perſons who have been regularly ſummoned to this ſervice. Formerly, it ſeems to have been held, that it was in the

upon the Northern Circuit. On the 3d January 1709, another application is made to the ſame effect; whereupon the Lords reſerve the declarator of the petitioners' right before the Judge Ordinary.

1 "Having conſidered the foreſaid petition, together with the ſaid charter of "exemption, and ſeveral ratifications thereof above ſpecifyit, diſchairging (ſhould "be *diſcharge*) all meſſengers at arms, macers of court, and other officers what-"ſomevar, frae citing or ſummoning any of the chirurgeons to paſſe upon aſſiſes "and inqueiſts, in actions criminal in tyme coming, and that conforme to their "gift and rights above ſpecifyit."

The words of Queen Mary's grant, as related in the petition of the ſurgeons, are, "Gives and grants licenſe to all chirurgeons, inhabitants within the bor-"rowes of this realme, then preſent, and their poſteritie, being for the tyme chi-"rurgeons, whilk are able and qualified perſons, after examination before the "deacon and brethren of that occupation, within the burgh of Edinburgh, ſhall "be found able and worthie to uſe and exerce the ſaid craft, and no others; "that they ſhall be free frae all compeirance and paſſing upon any inqueiſts or "aſſizes, in actions criminall or civil, juſtice-aires, juſtice-courts, ſheriff-courts, "borrowe-courts or others, for ſerving of breives, appriſing of lands, or any "manner of actions whatſumever."

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the diſcretion of the Court, (and in thoſe times, there might be great reaſon for ſuch a power), either to make uſe of the perſons cited for the trial, on the proſecutor's liſt, or to name others in their room, (as was done in the caſe of Kircaldie of Grange, February 11. 1596); or even, in caſe of a penury of habile aſſizers, ſummarily to call perſons *ex aſtantibus*, and make them enter on the office. Nay, Mackenzie [1] ſeems to deliver this as the law and practice even of his own time. But here, Lord Royſton has juſtly obſerved [2], that the regulations of 1672 are an abſolute hinderance of any ſuch interpoſition on the part of the Judge; ſince the pannel has no information from the liſt ſerved on him, of this new or ſurrogated perſon of aſſize.

MOREOVER; not only can no new perſon be called to this ſervice, but it is a good plea in law for declining any one, that his name or deſignation materially differs from that which is given him in the principal liſt of aſſize on record, or in the copy of that liſt delivered to the pannel. In the one caſe, there is no warrant (ſo it is conſtrued in law) to ſummon this perſon as a juryman; and in the other, the pannel has not had previous notice of him, in the way which law requires. But, if the pannel ſhall not object to ſuch a one, when preſented to him as a juryman, ſhall the effect of his ſerving in that capacity be one and the ſame in theſe two caſes? If the principal liſt be right, and the pannel's copy only inaccurate; certainly it lies with the pannel to take notice of this blunder, and ſtate his objection (as he muſt the like objection to his copy of the libel or liſt of witneſſes) at the time of naming the aſſize; and if he omit to do

[1] Part 2. tit. 23. No. 2. [2] Notes, *ad p.* 246.

do ſo, this ſeems to be an abandonment of any ſuch plea on his part; or rather it begets a preſumption in law, that the copy, ſuch as it is, has ſufficiently anſwered the purpoſe of its ſervice. Judgment was given accordingly, in the caſe of Bywater: for whom, after conviction, it was objected in arreſt of judgment, that John *Lothian*, merchant in Edinburgh, had ſerved on the aſſize; whereas no ſuch name was to be found in the pannel's copy of the liſt, but that of John *Letham*, merchant in Edinburgh, in its place. But here all was right in the record. Warrant had been given to ſummon John Lothian; John Lothian was ſummoned; and John Lothian ſerved on the aſſize; ſo that there was no fundamental vice in the caſe, but an incidental inaccuracy in a matter of accommodation only, which is extrinſic to the record, and whereof the pannel had omitted to avail himſelf at the proper ſeaſon; as indeed, if he pleaſed, he might wave the privilege of being ſerved with any copy either of the liſts or libel. Nevertheleſs, it may deſerve to be conſidered, whether the ſame anſwer is good in the caſe of the like variation from the record: as if the principal liſt bear the name of *John* Black merchant in Edinburgh, but *James* Black, merchant there is cited, and attends, and ſerves on the jury; and on return of the verdict, his true name of *James* Black is found in the liſt of aſſize thereto prefixed. It may be argued in ſuch a caſe, that there is here ſuch a diſconformity and want of coherence in the proceedings, as utterly annuls them, and cannot be obviated by any implied conſent on the part of the pannel, nor in any other way, more than if he were to be tried without a principal indictment. A perſon has ſerved on the jury (ſo it muſt be conſtrued in law, ſince the names on the face of the record are different) whom there

Feb. 27. 1781.

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was no warrant to ſummon, though by miſtake he has been ſummoned; and whom the Judge never appointed to that office, though by miſtake he has been allowed to ſerve; whereby the aſſize comes truly to be one of fourteen perſons only, juſt as in the caſe of a minor juryman, or one who is inſane. In the one ſituation too, as in the other, the pannel, not objecting at an earlier period, muſt be preſumed to have been ignorant of the exception; whereas in the caſe of an erroneous *copy* of the liſt, he has in his hands the certain means of information, at the time of naming the aſſize. But I forbear to enter farther into a pure ſpeculative queſtion, and one which is none of the moſt likely ſoon to occur in practice.

Swearing of aſſizers.

AFTER being preſented to the pannel, and received as competent to the office, the aſſizers are ſworn by the clerk of Court: "In the name of Almighty God, and as they ſhall "anſwer to God at the great day of judgment, that they "will truth ſay, and no truth conceal, in ſo far as they are "to paſs upon this aſſize;" an oath which ſeems more ſuitable to a witneſs than to a judge, and is one circumſtance among others which are ſuppoſed to mark, that the office of juryman aroſe out of that of compurgator. When once named and ſworn, the aſſizers cannot any of them be removed without the pannel's conſent, even before going to proof, unleſs for neceſſary reaſons emerging at the time; ſuch as inſanity, minority, or the like. But if the pannel agree, and before proceeding to proof, a new aſſizer may ſtill be ſubſtituted, for any reaſonable cauſe: As was done in the trial of Simpſon and Brown, at the deſire of a juryman, who, after being ſworn, objected for himſelf, that he was in ſome meaſure diſqualified by deafneſs.

July 24. 1786.

WHEN

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WHEN choſen and duly ſworn, the fifteen perſons of aſſize, are carefully ſeparated from the byſtanders and their brethren on the liſt, that no one may have communication with them, (of the effects of which afterwards); and they then enter on their functions, in attending to the evidence that is laid before them on either part.

CHAPTER XII.

OF PROOF BY CONFESSION; AND BY DECLARATION.

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No conviction on private knowledge.

IN the foregoing chapter, having taken a view of the chief circumſtances which relate to the compoſition of a juſt aſſize, I come now to unfold the nature and qualities of the ſeveral kinds of evidence, which the proſecutor may lay before the aſſize, in confirmation of his libel. And here I will begin with obſerving, that no jury are warranted to convict, except on ſuch proof as is external, if I may ſo ſpeak, to themſelves, and ariſes from teſtimonies of guilt which are publicly produced to them, and not from the private knowledge of the perſons of aſſize, or any of them. For, whatever may have been underſtood in this reſpect formerly, or whatever may be thought of the origin and inſtitution of the office of juryman, as more or leſs related to that of witneſs; it is now a good while ſince that notion gave way to the ſafer, and more ſalutary opinion, of his ſitting purely as a judge, to decide according to the ſufficiency of thoſe evidences of guilt which ſhall be openly laid before him. Yet it is true, that veſtiges are to be found of a different ſtate of the law, as late as the middle

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middle of laſt century. On the trial of John Calderwood for murder, the proſecutor brings no ſort of proof, and all is openly referred to the knowledge and conſcience of the aſſize [1] themſelves, being neighbours (the record ſays) and perſons having knowledge of the fact. In this inſtance the pannel is acquitted. But it is not ſo in the caſe of Thomas Scott, a ſhoemaker, accuſed of the murder of one of the ſame trade. The record makes no mention of any ſort of evidence as laid before the aſſize; and the verdict bears that they had conſidered "the declaratiouns maide be dyverſe perſones "of thair numbir, eſpeciallie George Purſell cordinir, James "Halyburton cordinir, and uthers who ſaw the ſtraike given "be the pannell to the ſaid umqhuill Colin Cruickſhank, "whereof he deceaſit:" on which ground they find the pannel guilty, and he has ſentence of death accordingly. But it is obvious, what dangers attend ſuch a courſe of trial, in which the aſſizers are withdrawn from all control of the public opinion, and even of the opinion of the Court, with reſpect to either the truth or the ſufficiency of the grounds on which they condemn. From this, however, it nowiſe follows, and far be it from me to teach any ſuch doctrine, that it can ever be warrantable for a jury to convict on any, though apparently deciſive evidence, if it is any how known to themſelves, or any of them, to be falſe or inconcluſive. But it cannot be inferred from this neceſſary reſtraint, which to violate in any caſe would be perjury, and in capital caſes murder,

July 31. 1635.

Dec. 30. 1643.

[1] "And furder, aſkit inſtrumentis that nae manner of probatioun is uſit or "ſchawin to the aſſyſſe, anent the pannell's guiltieneſs of the alledgit cryme "above written; bot that the ſamin is altogidder referrit to the ſaid aſſyſſe yr "awin knawledge and conſcience, quilk the pannall is maiſt willing unto, ſeeing "thay are all nybours, and beſt knawis the veritie thereof."

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der, that it is therefore allowable to convict a perſon in reſpect of private knowledge, againſt whom no lawful evidence has been obtained.

Proof by confeſſion.

To proceed therefore to the different ſorts of lawful proof. And *firſt*, of proof by the confeſſion of the pannel. Which, when attended with the proper circumſtances, of entire freedom, ſober deliberation, and ſoundneſs of mind, is the faireſt certainly, and moſt unexceptionable way of proof of any. And that it ſhall be poſſeſſed of every qualification of this ſort, which is naturally requiſite to confirm and lend it faith, has been very cautiouſly provided for in our later practice; which refuſes to liſten to any confeſſion that is not made by the priſoner perſonally, to and in preſence of the very aſſize impanneled for his trial. That he has already pleaded guilty to the Court, on the reading of his indictment, and that this plea has been entered on record, before all the forty-five perſons in the liſt of aſſize, does not with us, as in England, authoriſe the Judge to award ſentence; nor at all take away the neceſſity of remitting the charge to the knowledge of a ſpecial inqueſt, before whom he may retract this confeſſion, and who may acquit him if they will. And this, notwithſtanding what Mackenzie [1] has ſaid of the competency of inflicting arbitrary puniſhment on one confeſſing, without the ſanction

[1] Part 2. tit. 23. No. 3. He appeals to the caſe of Andrew Rutherford, 3d July 1622; and that of Job, 19th Jan. 1650. But in the laſt, the ſentence proceeded under a warrant of Privy Council, and in the other, it was pronounced of conſent of the pannel. This was the caſe alſo in the trial of Mathew Sandilands, a notary, who was ſuſpended and declared infamous for falſehood (Feb. 5. 1560): In token of his conſent, he ſigns the doom along with the Judge. This laſt I mention on the authority only of the MS. Abſtract in the Advocates' Library; for there is no record now extant of 1560.

ſanction of a verdict, ſeems truly to have been always our law. By way of farther precaution, in the trial of thoſe crimes, ſuch as murder, which leave plain traces behind them, the proſecutor has ſometimes thought it proper to ſtrengthen the pannel's confeſſion with other evidence of the *corpus delicti* at leaſt, or commiſſion of the crime. This was obſerved in the caſe of Margaret Hamilton, 17th May 1665; in that of Helen Hutton and others, 24th January 1726; in that of Mathew Randal, in July 1730; and in that of James Mackean, 12th December 1796; all of them caſes of murder. This, however, is not to be eſteemed the neceſſary, or ordinary courſe of proceſs on ſuch occaſions; but a method only which has been taken for ſuperabundant ſecurity, in ſpecial ſituations, where for particular reaſons, the proſecutor was unwilling that all ſhould reſt on the acknowledgment of the pannel. No ſuch confirmation was thought neceſſary in the caſe of Nicol Muſchet, a very atrocious caſe of murder, nor in that of Joſeph Hume, another caſe of murder, in March 1732.

Dec. 5. 1720.

Hiſtory of practice as to confeſſion.

BUT although, as has been ſaid, it be true that a pannel confeſſing, never could be lawfully puniſhed till convicted by an aſſize; yet with reſpect to the kind of confeſſion, on which an aſſize are warranted to convict, there is a wide difference between the notions of modern and of former times. As far as I have obſerved, the firſt inſtance in which it is marked in the record, that the pannel reiterated his confeſſion to the ſworn aſſize (having previouſly confeſſed in preſence of the whole forty-five perſons in the liſt), is in the trial of the ſaid Margaret Hamilton, in May 1665; and long after that time, it was in effect deliberately found, that any ſuch renewal

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newal was a pure ſuperfluous piece of caution. In the trial of Middleton, Macleiſh, and others, for treaſon, "My Lord "Advocate craved the Lords' interlocutor upon John Trotter "and Alexander Macleiſhe's confeſſions, emitted upon the "19th inſtant, in their Lordſhips' preſence, and before the "whole aſſize, in face of Court, whether the ſame be a judi-"cial and probative confeſſion or not.—The Lords finds the "foreſaids confeſſion ſua emitted before them and the aſſize, "to be both judicial and probative." Nay, the record is ſilent on this head, in ſundry trials even of a much later date; for inſtance, in that of Helen Hutton and others, and that of Joſeph Hume.

Feb. 21. 1694.

Jan. 24. 1726.

March 1. 1732.

It is not in this article alone, that the law has undergone an alteration in favour of the pannel. For in the practice of laſt century, entire credit ſeems to have been given to confeſſions previouſly emitted before the Juſtice, out of the preſence of any of the aſſize, (and Mackenzie indeed affirms that this is ſound law); nay, even to ſuch as had been made to inferior magiſtrates, or perhaps to clergymen, or others not ſtrictly entitled to any cognizance of ſuch affairs. The following, among other pannels, ſeem all to have been convicted on confeſſions of this leſs favourable kind. Alexander Miller, capitally convicted of ſheep-ſtealing, on his confeſſion before Menzies of Carclips, a magiſtrate, and Robert Lauder, a writer, who took it down. Sir Michael Preſton, convicted of murder, on his confeſſion before certain of the Lords of Privy Council, which the aſſize ſpecify as the ground of their verdict. Beſſie Purdie, convicted of child-murder, on production of her previous acknowledgment of guilt to certain miniſters and elders of the neighbourhood where ſhe dwelt.

Part 2. tit. 24. No. 4.

Dec. 15. 1615.

Feb. 15. 1631.

June 23. 1635.

The

The caſe of Fraſer, in 1641, taken notice of by Mackenzie [1], where the pannel was convicted in reſpect of his confeſſion made before the Aſſembly at Aberdeen, though afterwards retracted; "*ſed profectò iniquiſſimè*," is the remark of Lord Royſton [2]. John Carmichael, convicted of murder, on the evidence of his confeſſion made to the Juſtice, on the 25th September preceding. Duncan Macgregor, capitally convicted on the teſtimony of two clergymen to his confeſſion made to them [3], and a notary-public, and afterwards ratified before the Juſtice-depute. Thomas Scott, convicted of murder and robbery, on his previous confeſſion before the Lord Juſtice-Clerk. William, George, and Samuel Barry, all convicted of murder, in virtue of their previous confeſſions before the bailie of Cunningham, and two Juſtices of the Peace, on the 22d and 23d December 1673, and renewed to the Lords, by William and George, but not ſo fully by Samuel, on the 9th February 1674. George Clerk and John Ramſay, convicted of theft and murder, on their confeſſions [4] made to the Lords, on the 1ſt and 8th of December 1675.

Oct. 4. 1644.

July 15. 1643.

Nov. 11. 1669.

Jan. 25. and 26. 1675.

Jan. 17. and 18. 1676.

Hiſtory of practice as to confeſſion.

In addition to theſe inſtances, notice may be taken of the following, where the Court gave their ſanction to this doctrine, in the form of an interlocutor on the point of law. A debate had occurred on this head, in the trial of Finlay Macgibbon, who was indicted, *inter alia*, for the theft of certain horſes.

Dec. 2. and 3. 1669.

[1] Part 2. tit. 24. No. 3. [2] Notes, *ad p.* 257.

[3] It ſeems doubtful in this caſe, whether the confeſſion had been reduced into writing.

[4] The verdict ſays, "Conform to their own ſubſcrived judicial depoſitions, "ſubſcrived by them, and ſeveral Lords of Juſticiary."

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horſes. In ſole evidence of which charge, the accuſer produced the man's confeſſion, previouſly emitted before the Juſtices, and ſubſcribed by him and the Juſtice-Clerk; but which writing he now on his trial denied to be of verity. Hereupon, according to a practice often uſed in thoſe days, the Juſtice made a reference to the Privy Council, who declared generally[1] the right of the Juſtice to determine on the relevancy of the probation, and ordained him to do ſo in this particular caſe. He found accordingly, "that a confeſſion ta-"ken be the Juſtices, and ſubſcryvit be the pannel, is judicial, "and cannot be retracted here at the barre." In purſuance whereof, the aſſize found the pannel "guilty and culpable of "the ſtealing of the fyve horſs mentioned in his indytment, "and that in reſpeict of his owin confeſſion given before the "Juſtices." Not long after this, in the noted trial of James
Jan. 9. 1678. Mitchell, for ſhooting at Archbiſhop Sharp, there was an opportunity of pronouncing the like deciſion, concerning a confeſſion before the Lords of Privy Council, and emitted, as there ſeems too much reaſon to believe, (though four Privy Counſellors denied it upon oath), under the faith of a promiſe of ſafety to the man in life and limb. On this occaſion the judgment was as follows: "And alſo having "conſidered

[1] "Declare, That in the caſe of the ſaid Findlay, the Juſtice ought to deter-"mine all queſtiones concerning the relevancie of probatione, and eſpecially that "queſtione, whether or not the confeſſione emitted by the ſaid Findlay before "the Juſtice-Clerk, and ſigned by the ſaid Juſtice-Clerk, be a ſufficient proba-"tione, though the ſaid Findlay ſhould not renewe, or ſhould diſavow, the ſamin "at the barre; and declaires, that in all other caſes where any queſtione doth "aryſe anent the relevancie of probatione, the Juſtice ought to determine the "ſamin, and clear what is law; and if the aſſize ſhould proceid, notwithſtanding "of the legal evidence, found to be ſo by the Juſtice, and acquit, that they are "liable to be puniſhet and tryed by an aſſize of error."

" conſidered that part of the debate anent the pannel's con-
" feſſion, made and emitted before ane committie appoynted
" be authoritie of Councill to receive it, and thereafter ad-
" hered to and renewed in preſence of his Majeſty's High
" Commiſſioner and Lords of Privie Councill conveined in
" Councill, finds it is judicial and cannot be retracted; and
" alſo having conſidered the debate and defence againſt the
" ſaid confeſſion, viz. that the ſame was emitted upon pro-
" miſe or aſſurance of impunitie of life and limb, finds the
" ſamen relevant to ſecure the pannel as to lyff and limb,
" reſerving to the Commiſſioners of Juſticiarie to inflict ſuch
" arbitrary puniſhment as they ſhall think fit, in caice the
" defence ſhall be proven, and remitts the ſame to the know-
" ledge of an aſſize."

Hiſtory of proof by confeſſion.

IT is farther to be remembered, touching confeſſions made to the Lords of Juſticiary, or of Privy Council, that they were held to prove themſelves, and to require no aid of teſtimony on oath from the Judges ſubſcribing them, or other perſons in whoſe preſence the examination had been taken down. In one inſtance only, as far as I have obſerved, had any jury ever ventured to queſtion, how far the Judges were to be credited on their bare word, in a matter of this importance. This was in the trial of James Douglas for fire-raiſing, in Auguſt 1682. In ſole evidence againſt this man, the Lord Advocate produced a declaration of his, in what way emitted does not well appear, but ſigned by himſelf only, and another declaration before the Lords of Juſticiary, adhering to the former, and ſigned by ſome of the Judges, as well as by Douglas himſelf. At the bar, however, and before the aſſize, he refuſed either to acknowledge or diſown the authenticity of theſe writings. He was then

Aug. 4. and 10.

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taken from the bar; and ſome days after he was again brought into Court, when certain of the Judges acknowledged to the jury their ſubſcriptions at the paper. Whereupon, the Lord Advocate renounced all other probation, and proteſted for an aſſize of error in caſe the jury ſhould acquit "after "theſe confeſſions which the Lords have declared judicial." But this aſſize had more correct notions of the regular courſe of proceeding on ſuch occaſions, and both found a verdict for the pannel, and aſſigned their reaſon for it too. "In re- "ſpect they did neither hear the party confeſs the ſaid crymes, "nor the alleadged confeſſion of the pannel, given in for pro- "bation thereof, *owned* be the pannel, nor otherways *pro-* "*ven.*" The doubt in this inſtance, was, however, about the way only of proving the confeſſion; for it is implied in the words of the verdict, that the jury would have convicted on that ſingle teſtimony of guilt, if it had been duly proved to be authentic.

Aug. 10. 1682.

Hiſtory of proof by confeſſion.

NUMEROUS as theſe precedents are, it does however appear, that, even in thoſe leſs improved times, lawyers of eminence ſtill continued to entertain doubts about the law; and that inſtances occaſionally happened where effect was given to ſtricter notions on this ſubject. Particularly in the trial of Smith, Robertſon and others, who had confeſſed before a committee of Privy Council, it was thought material to have their declarations acknowledged and renewed in Court, and in preſence of the aſſize. In the end, the Legiſlature themſelves furniſhed the bar with a good argument againſt the ſufficiency of ſuch confeſſions in the ordinary caſe, by paſſing a ſpecial law, the act 1685, c. 10., which declared them to be valid and judicial, in the ſingle caſe of "indictment for "treaſon againſt the King's perſon or government allenarly," and

Sept. 16. 1672.

and only when emitted after ſervice of the indictment. This, ſays the ſtatute, notwithſtanding of the 90th act 11th Parl. of James VI., which it ordains "to continue in its full force "as to all the reſt of its tenor and contents." In theſe laſt words, the ſtatute ſeems truly to arraign the older practice, as inconſiſtent with that ordinance of James VI.; and accordingly, from this time forward, as far as I have obſerved, no precedent of that ſort is to be met with.

THERE is ſtill another point touching confeſſions, in which, equally as the former, the practice of the preſent century is an improvement of that of the laſt. In caſes which concerned the ſtate, or thoſe which on any account excited an etraordinary intereſt, it ſeems to have been nowiſe uncommon, previouſly to interrogate the pannel upon oath. This had been done, for inſtance, in the caſe of Turnbull, for ſuborning witneſſes, (22d June 1622); in that of Maxwell of Gerrarie, for murder under truſt, (15th December 1619); in that of Meldrum, (Auguſt 2. and 3. 1633), for burning the tower of Frendraught; and in that of Toſhoch, (June 21. 1634), for the ſame crime. No ſuch conſtraint is tolerated in the practice of later times.

As this ſort of confeſſion was procured by means of violence offered to the conſcience of the priſoner; ſo here, as in moſt other countries of Europe formerly, confeſſion was ſometimes extorted by violence, and torture applied to the body alſo. This, however, chiefly by the orders and under the direction of the Privy Council; for I cannot find that torture had ever become an ordinary inſtrument of inquiſition, or one which even the Court of Juſticiary, and much leſs any of the inferior courts, could preſume

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ſume to employ without the warrant of a previous conſultation with that ſupreme and ſuperintending authority. Moreover, to make way for the uſe of this barbarous expedient, it ſeems to have been required in our practice, which was conformable herein to the foreign authorities uſually reſorted to in ſuch queſtions, that there ſhould at leaſt be grounds of preſumption (though, to be ſure, theſe could hardly be reduced to any rule) againſt the ſuſpected perſon. It is no leſs true, on the other hand, that though his confeſſion of guilt, extorted in this extremity, was received as an article of evidence againſt the unhappy priſoner on his trial; yet was he not held to purge himſelf of ſuſpicion, nor to purchaſe an immunity from farther queſtion or proſecution, by the firmeſt and moſt invariable aſſertion of innocence, under ſo ſore a trial of his truth. In the caſe of the aforeſaid Toſhoch [1], who had been uniform in his denial of the charge, the Juſtice ventured only to go this length in his favour, that he could not be tried except on the emerging of additional preſumptions, beſide thoſe on which he had been remitted to the torture. From the debate in this trial I learn, that in the caſe of George Sprott, Auguſt 12. 1608; and that of Maxwell of Gerrarie above quoted; as alſo the caſe of Muir of Auchindrayne, July 17. 1611; the libels were found competent, and convictions were obtained, notwithſtanding the previous torture, which theſe pannels had endured without confeſſing. In the later trial, of John Spreul, ſuch a plea was repelled upon this, ſurely inſufficient ground, that thoſe who interrogated him, had gone beyond the warrant

See Fountainhall, Nov. 24. 1684.

June 21. 1634.

See Fountainhall, June 10. & 13. 1681.

1 "Findis that the pannel aucht not to be put at this tyme to the knawledge "of an aſſyſe, without prejudice alwayes to the perſewaris, uponn new ſufficient "indices, to purſew the pannell *de novo*, as accordis of the law."

rant [1] of the Privy Council in their queſtions. Nay, in the caſe of James Mitchell, in January 1678, torture was employed, to obtain a confeſſion from him of farther crimes in which he was not concerned, (at leaſt, there ſeems great reaſon to believe ſo), after he had voluntarily emitted a firſt confeſſion of the truth, on promiſe of ſafety in life and limb. It was chiefly about this period, and in ſupport of the meaſures of the King's miniſters, againſt the deluded Covenanters, meaſures equally violent and impolitic, that our practice came to be ſtained with the more frequent uſe of this unjuſt and barbarous engine for the diſcovery of tranſgreſſors. And to ſo great a length was the iniquity carried in thoſe days, that confeſſions obtained in this way, were made uſe of as an evidence, *in modum adminiculi*, towards the conviction even of third parties; the confeſſion of William Carſtairs, for inſtance, [2] againſt Baillie of Jerviſwood. Nevertheleſs, at the Revolution, the Convention of Eſtates went no farther than to complain of the torture as unlawful, when uſed without evidence, or in ordinary crimes. In the end, it was, by ſtatute 7th Anne, c. 21., forbidden to be uſed in any ſituation, or on charge of any crime whatſoever.

Act 1689, c. 13.

II. ALTHOUGH, as already ſaid, it has rightly been ſettled, that a confeſſion made out of the preſence of the jury is not ſuch a proof of the pannel's guilt, upon which, of itſelf, he may warrantably be convicted; yet, it in nowiſe follows, that a confeſſion made elſewhere, if in ſuch circumſtances as

Declaration is an article of evidence.

1 "Repells the defence foundit upon the tortor, in reſpect the commiſſion of "the Privie Councill did not warrand the pannall to have been putt to the queſ-"tion upon any of the crymes mentioned in the dittay."

2 See Fountainhall, September 5. and 6.; December 23. 1684.

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as ought naturally to confirm and lend it faith, is therefore of no weight at all in the ſcale of reaſon, and ſhall be utterly diſregarded in judging of the evidence in the caſe. That a perſon who is apprehended, and carried before a magiſtrate on ſuſpicion of a crime, has there, freely and deliberately, in his ſound mind, and ſober ſenſes, without any conſtraint of fear, or any allurement of promiſes or rewards, made confeſſion of the charge; and has ſolemnly adhered to this confeſſion when taken down in writing, and read over in his preſence; cannot but be eſteemed a ground of preſumption againſt him, and a circumſtance at leaſt of evidence, and one indeed of no mean or ordinary weight, in the compoſition of the proſecutor's proof. And as this is undeniable in the nature of the thing itſelf; ſo neither is ſuch an employment of the priſoner's declaration in anywiſe inconſiſtent, though it has often been argued ſo, with the ſtatute of Ja. VI. above mentioned, which orders "the haill accuſation, rea-
Stat. 1587, c. 91. "ſoning, writtes, witneſſes and uther probation and inſtruc-
"tion quhatſumeyer of the crime," to be taken in preſence of the aſſize. As relative to the uſe which was formerly made of ſuch a confeſſion, the uſe of it as judicial, irretractible, ſole and concluſive evidence of the pannel's guilt, in like manner as if emitted to and in preſence of the aſſize, that objection was good: for if, of itſelf, it at once eſtabliſhed the ſeveral facts and matters therein ſet forth; certainly it was evidence thereof which was not taken in the way preſcribed by the Legiſlature. But, according to the uſe which is now made of the declaration, the ſtatute in nowiſe touches the caſe; becauſe the writing is not now produced as full evidence of the truth of its own contents. The proſecutor pleads only to this effect: that it is a circumſtance of preſumption againſt the pannel, that once, at ſuch a time, and

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on ſuch a ſolemn occaſion, he freely, ſeriouſly, and deliberately, did accuſe himſelf of that wherewith he now is charged. To ſhow in the beſt and moſt authentic form, what it was whereof he then accuſed himſelf, the writing itſelf muſt be produced; yet ſtill, after all, it is not ſhown to the aſſize as concluſive of the truth of the ſtory there related, but as an article only in the compoſition and hiſtory of that circumſtance of ſuſpicion, which alone is meant to be proved againſt the pannel, viz. that he once confeſſed and charged himſelf before a magiſtrate to a certain effect. That he *did* ſo confeſs, *is* proved, as the ſtatute of James VI. directs, before the aſſize, by the depoſitions of the perſons who took or attended at his examination, and who ſwear to the writing now produced, as that which was fairly taken down from the pannel's mouth, and duly authenticated in their preſence. That the thing itſelf which is thus ſworn to, did not happen before the aſſize, is quite as indifferent in this inſtance, as with regard to any other circumſtance or ground of preſumption, which may be uſed as an ingredient of the proof. If the pannel had written a letter to any of his aſſociates, relating the fact, and the letter had fallen into the proſecutor's hands; this he certainly might employ (proving the pannel's hand in the courſe of the trial) as a preſumption of his guilt; and it would be a ſtrange argument to the contrary, that the aſſize were not preſent at the writing of the letter. And juſt ſo it is with reſpect to the pannel's declaration, which ſerves in the like capacity as ſuch a letter; with this difference only in its favour, that it is emitted at a ſeaſon when the man is warned of his danger, and is on his guard reſpecting the conſequences of what he ſhall declare.

CHAP. XII.

Declaration is an article of evidence.

Jan. Feb. 1734.

ACCORDINGLY, though often pleaded in former times, this objection has now for a good while been abandoned at the bar, and the pannel's declaration been freely received as an article of evidence on his trial. Suffice it therefore to refer to the caſe of John Scott *alias* Park[1], where the interlocutor of Court ſpecially ſuſtains, among other circumſtances, the pannel's confeſſion before a magiſtrate; and to the following inſtances, in which after debate on the point, our Judges repelled the objection taken to this article of preſumption: the caſe of Margaret Stewart, March 1743; of James Macpherſon, December 1743; and John Irving, Auguſt 6. 1744. Nay more, and which is far ſtronger, in the trial of Maciver and Maccallum in July 1784, for ſinking inſured ſhips, to defraud the underwriters, declarations were allowed to be given in evidence, though emitted in a civil action only at inſtance of the pannels, for recovery of the value under the policy of inſurance. And truly there ſeems to be great reaſon in ſuch a judgment. For though the degree of faith that is due to a confeſſion, may vary according to the occaſion on which it is made; yet ſtill, whatever the occaſion may have been, the man's ſerious impeachment of himſelf in a written form, muſt always weigh leſs or more in the ſcale againſt him.

Declaration, how proved.

IF not acknowledged by the pannel in preſence of the jury, his declaration muſt be eſtabliſhed by the teſtimony of two

1 "Suſtained the following facts and circumſtances, relevant, viz. That there "was ſtolen from Alexander Atkine in Whitebanks, the time libelled, a horſe; "and that the next day thereafter, or in the morning of the day following, the "ſaid ſtolen horſe was found in the pannel's poſſeſſion, and upon apprehending "and examining him about the ſaid horſe, he the ſaid pannel did confeſs and ac-"knowledge the theft."

two witneſſes on oath. For a circumſtance of this kind is too weighty to be taken on the faith of one perſon only; more eſpecially as the evidence of it is ſubject always to the will and diſcretion of the magiſtrate-examinator, who is to blame if he fail to call proper witneſſes on ſuch an occaſion. In the trial of Patrick Neal, after one witneſs had ſworn to the paper, the Court found, "that the declaration li- "belled on, dated the 7th day of September laſt, not being "proved by two witneſſes, cannot be read." Afterwards, the proſecutor confirmed it with the teſtimony of a ſecond witneſs; and then the Lords allowed it to be uſed. "In reſpect "that the ſaid declaration is now proved by two witneſſes, "allow the ſame to be read and admitted as part of the "evidence." Fully to eſtabliſh the credit of a declaration, the witneſſes muſt have been preſent while it was emitted, and be able to ſwear, that it is the pannel's own free and adviſed act, done in his ſound mind, and ſober ſenſes, under no allurement of promiſes, and under no threats of evil if he ſhould decline to anſwer, or ſhould anſwer otherwiſe than the accuſer might deſire. They muſt ſwear alſo, that the paper now produced to them is the very declaration which was taken at the time in queſtion: ſo that upon the whole thoſe only ſeem to be fully competent to bear teſtimony on this head, who have ſpecial cauſe of knowledge concerning the particular paper; ſuch as the magiſtrate who took and ſigned the declaration, the clerk with whoſe hand it is written, the witneſſes who heard and ſaw it emitted, written and ſigned, and who themſelves authenticated it with their ſubſcriptions. It cannot well be expected of any one, to be poſitive, upon memory purely, reſpecting the accuracy of the contents of ſuch a paper; and I find that John Maxwell declined to be ſo, in the trial of Margaret and Helen Adams;

Feb. 24. 1777.

Jan. 24. 1774.

CHAP. XII.

Adams; having only heard their declarations given, and not having waited to ſee them taken down in writing and ſubſcribed. But even if this witneſs had been leſs ſcrupulous on the occaſion, it is not clear that his evidence would have been allowed to authenticate the particular writing; both on account of the raſhneſs, generally ſpeaking, of ſuch a teſtimony, and becauſe it was not that beſt and moſt unexceptionable ſort of evidence which the caſe admitted, and regularly ought to have received. It is true, that in the trial of Thomas Mow for murder, two perſons who were preſent at his examination before the Sheriff of Roxburgh, which was taken down in writing, but without being ſigned by thoſe perſons, were allowed to ſwear to what they underſtood to be the ſubſtance of his confeſſion. But this, even if it were clearly lawful evidence, is far from being the ſame thing, or of equal credit, as the verifying of the written paper: It eſtabliſhes a verbal confeſſion only.

Nov. 21. 1666.

Verbal confeſſions, are articles of proof.

And here, in connection with what has been ſaid, I will take occaſion to obſerve, that our practice does not refuſe to lend an ear even to pure verbal and extrajudicial confeſſions of guilt; though, on account of the diſadvantages which attend them as to the manner of proof, and ſometimes the circumſtances which give riſe to them, they cannot be favoured with the ſame high degree of credit, as thoſe which are made in writing, and with more ſolemnity and deliberation. Indeed it often happens, that a confeſſion of this kind is ſo interwoven with the other facts and circumſtances in the caſe, that it cannot without violence be ſeparated from them; nor the witneſſes tell their tale intelligibly, or with the due connection, without relating this part alſo of the ſtory. For inſtance, in a caſe of theft, if the thief being ſeized with

with the ſtolen goods upon him, inſtantly confeſs his crime, and offer back the goods to the owner, or tempt him with a bribe to let him go. Or in a caſe of murder, if the killer be taken red-hand, and brought into the preſence of the dying man, and there lament his raſhneſs, and claim forgiveneſs of his victim, before he die. Such incidents cannot be viewed in any other light, than as natural and neceſſary parts of the chain of circumſtances, and as equally bearing evidence againſt the pannel, as the blood on his clothes, or the goods found concealed on his perſon.

Verbal confeſſion is an article of evidence.

It has therefore, at all times, been our cuſtom, to allow a proof of circumſtances of this character, and to take them into due conſideration, according to the nature of the things themſelves, and the evidence with which they are confirmed. In the caſe of Thomas Mow already mentioned, it was given in evidence, that the pannel on his knees aſked pardon of the relict of the deceaſed, and ſaid that he had not the power to fly, having the blood of the father of ten children on his head. In the trial of Margaret and Agnes Taylor for child-murder, the chief article of evidence was their confeſſion, on being ſhown the body of the child. And in the caſe of James Bartleman, who had ſentence of death for murder, the entire proof (but here the jury went too far) conſiſts of his confeſſions made to the byſtanders, when he was taken, and on finding the body of the deceaſed. In the caſe of Nicholas Croſbie, the interlocutor of Court takes notice of theſe circumſtances, as ſufficient for conviction. "Find, that he "the ſaid pannel and the ſaid Barbara Reid, at the time "libelled, being together within the houſe of John Mer-"cer in Aberdeen, were ſeen and heard therein ſcolding and "quarrelling with one another, and thereupon were ſeen to "go

Nov. 21. 1666.

June 24. 1663.

Nov. 14. 1679.

July 13. 1719.

CHAP. XII.

" go into a room of the ſaid houſe, and immediately thereafter " a cry of murder was heard, upon which ſome perſons having " immediately entered into the ſaid room, found none therein " but themſelves two, and found the ſaid Barbara Reid lying on " the ground bleeding of her wounds or ſtrokes, and the pannel's " gun found broken beſide her, and that he the pannel was " heard to ſay, *that he was ſorry for what he had done*, and that " ſhe ſoon thereafter died; all jointly relevant to infer that the " ſaid pannel is guilty of the murder of the ſaid Barbara
Feb. 23. 1719. " Reid." In the trial alſo of Crief and Cordie, one of the circumſtances enumerated in the interlocutor of relevancy is thus: " That the next day thereafter, the ſaid Neil Cordie " was heard to confeſs that he was the perſon who gave the
July 24. 1721. " wound." So likewiſe, in the trial of Janet Hutchie for child-murder, " The Lords find that, at the time and place li- " belled, there being a dead child found and taken out of the " water, wrapt within a codware, and a ſtring hard and faſt " tied about its neck, and at that time Janet Hutchie, pan- " nel, after ſhe was inſpected, being found in the ſtate of a " woman newly brought to bed of a child, and thereafter the " ſaid pannel, after calling for the miniſter and her brother, " or before any other perſon, did confeſs to them, that the " ſaid child drawn out of the water was brought forth by " her, and after the birth murdered by her, all jointly rele- " vant to infer the pain of death." And again, in the trial
March 8. 1720. of Helen Marſhall, " The Lords, &c. find the following facts, " viz. that the ſaid pannel, the time foreſaid, brought forth " a ripe child, or appeared then to be in the circumſtances " of a woman newly delivered of a child, and that the child " was found dead under the bolſter of the pannel's bed, " being bloody, and having marks of a violent death, and " that the pannel did at that time acknowledge before ſeve-

" ral

" ral witneſſes that ſhe had brought forth the ſaid child, and " after the birth did cut and wound the child with a knife, " and thereafter did ſtifle it under the bolſter of her bed, " all jointly relevant to infer the pannel's guilt of the ſaid " crime, and liable to the foreſaid pains," &c.

Verbal confeſſion is an article of evidence. Feb. 16. 1725.

In the trial of Archibald Walker, for the murder of Walter Macfarlane, George Macrae is allowed to depone as follows: That ſoon after the fact, the pannel in paſſing through Macrae's yard, " deſired the deponent to go and " lift up Walter Macfarlane's head; and the deponent aſked, " *What ailed Walter Macfarlane, if or not he was drunk?* To " which the pannel anſwered, *No; but he had given him a ſtab* " *with a durk:* And whereupon the pannel went from the de- " ponent, but ſome time thereafter did return again, and " ſpoke to him through his window, and aſked him if Walter " Macfarlane was dead, and the deponent told him that he *was* " dead; and thereupon the pannel ſtruck upon his thigh with " his hand, and the deponent adviſed him to make the beſt of " his way, for there were a hundred in purſuit after him; " and thereupon the pannel went off immediately." In the caſe of Baillie and Torrence, which was a caſe of aſſault and perſonal injury, the libel bore, and no objection was made to it as an article of preſumption, that ſome days after the aſſault, when the ſufferer was ſuppoſed to be in danger of his life, the pannel viſited him, and begged forgiveneſs of his fault. Witneſs alſo the caſe of James Chriſtie, indicted for killing a man, whom he had found in the act of adultery with his wife: To his neighbours coming in, and inquiring what had happened, he readily anſwered and avowed, that it was he who had done the deed; the dead body being at his feet at the

Mar. 8. and 16. 1726.

Nov. 15. 1731.

CHAP. XII.

Aug. 1. and 6. 1743.

the time: which is part of the teſtimony of John Deas upon the trial. I may refer alſo to the libel againſt Robert Wilſon for robbery, which related, "That he having been purſued, and ſoon thereafter apprehended, he confeſſed the "foreſaid robbery, and the foreſaid pieces of money that he "acknowledged he had robbed, were found in his poſſeſſion; "and he acknowledged that the coat found near the place "where the ſaid robbery was committed, was his coat, and "was there left by him." Now, to this part of the ſtory the pannel objected, that it could not go to proof; but his plea was overruled, and evidence was given to theſe, along with the other articles of preſumption in the caſe.

Aug. 9. and 12. 1755.

So likewiſe, in the caſe of Andrew Wilſon, it was libelled as follows: "And farther, you, on hearing of a warrant be-"ing iſſued againſt you, to apprehend you for the ſaid crime, "did abſcond from your ſaid houſe, and hide yourſelf, and "on being ſeized by the conſtables, you did expreſs your "conſciouſneſs of your guilt of the ſaid crime, by crying out "then, *that you was gone*, or words to that purpoſe." The witneſſes, however, did not depone to theſe words, but generally, that he was in great confuſion, and ſeemed to be troubled, when he was taken.

Verbal confeſſions are articles of evidence.

It would be eaſy to ſwell this liſt with many more precedents of the ſame complexion; but it is better to take notice of the following inſtances, where evidence was given of confeſſions not ſo intimately connected with the ſtory of the criminal fact, and ſome of them made in leſs favourable circumſtances, or obtained by the uſe of ſuch means, with reſpect to the propriety of which there is at leaſt more room for difference of opinion. In the trial of Alaſter More, for

May 7. 1668.

murder

murder and herſhip, Captain Patrick Gordon depones to the pannel's confeſſion of the murder, in the courſe of a communing with him, at ſome diſtance of time after he was taken. Againſt James Mitchell, evidence was taken of a confeſſion made in gaol, and in converſation with Patrick Vanſe the gaoler, and his ſon. In the trial of Margaret Main for child-murder, teſtimony was given to ſundry verbal confeſſions, made at different times, to the ſeveral members of a kirk-ſeſſion, and to the magiſtrates of a burgh. In like manner, in the trial of Anderſon and Marſhall, James Chalmers, a beggar, who had been committed along with them, on ſuſpicion of being an accomplice, gave his evidence as follows: "That ſome time thereafter the pannel having lain down up- "on ſome ſtraw that was on the floor, the deponent again "preſſed him, and aſked him whether or not he was the per- "ſon that had committed the robbery; and upon the deponent's "promiſing to keep it ſecret and not to reveal it, he Ander- "ſon did own that he was the perſon that robbed Bailie Rule, "and that he gave the money which he had robbed to Thomas "Marſhall." On the ſame occaſion, Jonathan Allan, alſo a priſoner, deponed, that being confined in the ſame chamber with him, "Anderſon the pannel confeſſed to the deponent "that he was the perſon who had robbed Bailie Rule, and that "he had taken off him ſeventy-two guineas in gold, L. 9 Ster- "ling in ſilver, and ſixty-five bank-notes." Nay more, one of the miniſters of Linlithgow, whom Anderſon had ſent for to diſburden his conſcience, was allowed to give evidence reſpecting a confeſſion made in his preſence, and that of two of the bailies of the burgh, though afterwards retracted and denied. Now this, I think, can hardly be juſtified; for it tends to deprive ſuch unfortunate perſons of the benefit of that ſpiritual

Jan. 9. 1678.

Jan. 19. 1700.

Dec. 2. 1728.

CHAP. XII.

conſolation of which they may often be in need, if they cannot have it but at the riſk of their body, in adding to the weight of evidence againſt them.

MUCH of the ſame ſort was the evidence taken againſt Elſpeth Robertſon, in her trial for child-murder: in a converſation with the Advocate-depute, and in preſence of two perſons who accompanied him to the gaol, ſhe had confeſſed her having born a child. The like was allowed in the caſe of Wilſon and Hall, of whom the former had verbally confeſſed to his Majeſty's Solicitor-General, in gaol; as Hall had previouſly done to certain other perſons, whom he inſtructed how to find the money-bag, in a field where he had dropped it, and how to take his accomplices, againſt whom he informed; but all this, it rather appears, after he had come to cheriſh hopes of being received as a witneſs for the Crown. Again, I may take notice of the caſe of James Ratcliffe, where a Juſtice of the Peace (Mr Craigie of Kilgraſton) deponed to a confeſſion made in gaol, in the courſe of a communing with himſelf alone [1]. The laſt inſtance that I have found of this complexion, is in the trial of John Andrew, William Love and others, where evidence was received of ſeveral converſations

Nov. 15. 1728.

Mar. 10. 1736.

June 25. 1739.

[1] The libel of Adam Wilſon for child-murder, (Aug. 9. 1747), bears that he was brought "into the preſence of James Stewart, Sheriff-depute of the ſhire of "Kinroſs, before whom he then emitted a declaration or confeſſion, in which he "acknowledged part of the facts already ſet forth, although at that time he "thought proper to deny that he knew any thing of the ſaid M. A. parting with "child; but he having thereafter *been dealt with in order to acknowledge his* "*guilt*, he did, on the 3d day of April laſt 1747, in preſence of the ſaid James "Stewart, confeſs and declare," &c. This declaration was admitted to proof, though there ſeem to be reaſons againſt it.

verſations between Love and his fellow priſoners [1] in gaol, relative to the houſebreaking of which he was accuſed. Beſide other and not trivial reaſons of repugnance, which the humane reader will readily feel, to the uſe of confeſſions ſuch as theſe, made haſtily, at unguarded moments, or in a ſtate of affliction and deſpair, and under the faith of ſecrecy and confidence, expreſs or implied; it may be queſtioned how far the ſort of teſtimony that can ordinarily be had to them, and to the manner and true motives and preciſe import of them, unconfirmed as they are with any relation to any overt fact or circumſtance, is of ſuch a kind as makes them fit to be received, or credited, in trial for a crime.

CHAP. XII.
Mar. 14. 1774.

Now a few words, before diſmiſſing the ſubject of confeſſion, concerning the competency of putting the pannel to acknowledge his guilt, on a reference of the libel to his oath. This, in trial for uſury, is made a lawful courſe of proof, by the poſitive enactment of the ſtatute 1600, c. 7.: and Robert Lauder, had his acquittal accordingly, in conſequence of his depoſition in his own favour; as had James Wilſon alſo, whoſe oath was taken (but this only in purſuance of his own conſent) along with, and in ſupplement of the other probation of the libel. But, as a particular law was needful to authoriſe this courſe of inquiry in the caſe of uſury, though ſeldom puniſhed but with patrimonial penalties; ſo it appears to be repugnant to the ordinary tenor of our practice, which even in civil matters is actuated with a great fear of involving any one in the guilt of perjury, that a perſon ſhould be placed in this hard and trying ſituation, where conſcience is at war with the ſtrongeſt propenſities of our nature. With reſpect

Reference to pannel's oath.

Sept. 4. 1668.

Nov. 11. 1667.

[1] See the evidence of Robert Henry and John Clerk.

CHAP. XII.

ſpect to crimes in themſelves capital, though the proſecutor have reſtricted his libel to inferior concluſions, how low ſoever theſe may be, a rule is laid down to us in the claim of right; which declares that it is contrary to law, that the lieges ſhould be called on to depone againſt themſelves on ſuch occaſions. This article of that valuable charter, had reference to the iniquitous proceedings againſt Baillie of Jerviſwood, and other landed men, towards the end of the reign of Charles II.; who were indicted for reſetting rebels, and were called to ſwear on that charge, with reſervation of ſafety only to life and limb, and on confeſſion, or refuſal to ſwear, were condemned in heavy fines, and ſome of them even ſent to the plantations [1].

1689, c. 13.

Reference to the pannel's oath.

But farther, although it have not been declared by the ſame high authority; yet we may warrantably conclude, both on the reaſon of the thing, and the ſtate of practice, that it is unlawful even to exact an oath from any one, reſpecting any charge which is proſecuted to affect his perſon or liberty, or which in itſelf, though not inſiſted on to that extent in the particular caſe, is plainly of an infamous and diſhonourable nature. And indeed, even in the laſt century, the inſtances of abuſe in this reſpect ſeem chiefly to have happened in proceedings relative to ſtate crimes, before the Privy Council, and in what were then called inquiſitions, rather than in the courſe of ordinary trial for vulgar offences. In this latter department, all the inſtances which I have obſerved of reference

[1] See Fountainhall, 4th Sept. 1684, Baillie; October 1684, Shaw, Montgomery, and others; 4th Dec. 1684, Young, &c.; 24th Dec. 1684, Bannatyne, Stewart, &c.

reference to the pannel's oath, are in caſes like the following. Alexander Home, being proſecuted for ſtealing corn, laid his defence on this, that he had carried off the corn as a creditor, by his lawful diligence of poinding. The purſuer offered to prove by his oath, that truly the poinding was not lawful, in as much as the officer got his order to poind, before any decree had been obtained. This was found relevant; and the pannel having deponed in his own favour, the proceſs thereupon ſtopped ſhort. Again; in the trial of the Viſcount Frendraught, and others, for incarcerating John Wiſhart after ſuſpenſion of the letters of caption againſt him, the pannel's plea of ignorance was allowed, unleſs the proſecutor would prove his knowledge of the ſuſpenſion, by intimation or otherwiſe. Accordingly, this matter being referred to the Viſcount's oath, he deponed *negativè*, and was ſtraightway aſſoilzied without ever being remitted to an aſſize. "In "reſpect of the ſaid depoſition, the Juſtices fand the dittay "not relevant as to the ſaid Viſcount of Frendraught; and "therefore deſert the ſaid dyet as to him." Now, in both inſtances, the ſubject of the oath, though deciſive of the iſſue, was in a great meaſure of a civil nature, and ſuch as if not ſettled in this ſpeedy way of trial, the Lords might probably have referred, according to the cuſtom of thoſe times, to the judgment of a civil court. There is one caſe more, of a ſingular nature, where this courſe of inquiry was allowed; the caſe of Robert Burnet, who was pannelled for cutting down ſixty great trees on the proſecutor's lands. The libel was referred to his oath, and he deponed *negativè*, and was aſſoilzied. But the offence here ſeems to have been more of the nature of a treſpaſs, or moleſtation, than a crime; and accordingly, on this occaſion alſo, the Court judged of the oath, without ever remitting the libel to an aſſize.

Feb. 11. 1669.

Jan. 8. 1669.

Nov. 15. 1637.

UPON

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UPON the whole, therefore, I think there is only room to inquire concerning thoſe inferior delinquencies, ſuch as aſſault and breach of the peace, which are not neceſſarily attended with infamy, and are proſecuted for fine and damages only, whether the delinquent may not lawfully be conſtrained to abſolve or condemn himſelf by his oath. Yet, even of this I have not found any inſtance in the Books of Adjournal, within that period which is chiefly entitled to regard in any controverſy of this complexion.

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CHAPTER XIII.

OF PROOF BY WITNESSES.

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ENOUGH has now been ſaid reſpecting proof by the confeſſion, or the declaration of the pannel. Let us next inquire concerning the more ordinary, but leſs ſimple ſort of proof, which muſt be reſorted to in default of confeſſion: I mean proof by the teſtimony of credible witneſſes; of ſuch perſons who have had occaſion to know the verity of the charge, and on whoſe word the Judge can have reliance, in a mattter of this importance. Who theſe are, we ſhall beſt learn by running over the ſeveral diſqualifications which are now acknowledged of the law: a point in which the practice of this century (owing to the great improvement in the condition, and, it is to be hoped, in the morals alſo of the inhabitants of Scotland) is far more liberal than that of older times.

Objections to witneſſes. Females.

IN the laſt century, on ſo narrow a ſcheme had our lawyers formed their notions in this important article, as to exclude generally all witneſſes of the female ſex; though an exception might ſometimes be allowed, at the diſcretion of the

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the Judge, in the trial of an occult or domeſtic crime, or for ſome urgent reaſon in the nature of the particular caſe.

Aug. 21. 1661. Thus, in the trial of Thomas Bruntfield for houſebreaking, we find the Juſtices coming to a reſolution, "that thay would "not in time cuming admit any woman ane witneſs in the "mattir of theft, bot only *ex officio*." And in the trial of

April 21 1664. Swinton, for adultery and the murder of his wife, though the Juſtice deviates from the ordinary practice; yet ſtill it is not without aſſigning his reaſon for it, "he having formarlie "examined the witneſs, finds the natour of the cryme *ſuch*, as "he thinks fitt to mak uſe of women as witneſs for proving "thereof." The thing is alſo juſtified with a reaſon in two

Nov. 8. 1675. caſes more. In the trial of Muir of Pennyglen for hame-ſucken, "the Lords in reſpect that the cryme is domeſtick, "admitts the women to be witneſs, notwithſtanding that the "perſewar reſtricts his libel to an arbitrary puniſhment." In

Feb. 4. 1678. the trial of John Faa for murder, "the Lords, &c. having "conſidered all the circumſtances that attend this particular "affaire, and the penurie of witneſs, ordaine the women wit-"neſs to be received." For the like reaſon, in the caſe of

Mar. 12. 1678. John Kirkwood, women were received to prove an aſſault[1] made on a woman in her own ſhop. In the trial of William

Sept. 8. 1693. Aird for murder, the women were admitted under a certain quality and diſtinction. "The Lords allow the women to "to be received witneſs, *cum nota*, as to all things done with-"out doors, but admitts them *ſimpliciter* as to all things done "within doors." On the other hand women were rejected in

Jan. 12. 1674. the trial of John Fraſer for adultery[2]; the charge not being of

[1] "Having conſidered the objections againſt the witneſs, and the anſwer made "thereto, they admitt of the women witneſs in this caice."

[2] "The Lords, &c. repells the woman from being witneſs in this caice."

of a ſingle fact, but of an open and notorious cohabitation. They were again rejected in the trial of Andrew Rutherford for murder, who offered to prove by ſeveral women, that the deceaſed, with his dying breath, had blamed himſelf as the author and provoker of the mortal quarrel. "The Lords in regaird "they find ther was no *penuria teſtium tempore mortis*, they there-"fore refuſe to admitt the women witneſs." But reaſon and humanity were able at length to overturn this illiberal, and often iniquitous diſtinction, (in which we had loſt ſight of the civil [1], to follow the precepts of the canon law, and its commentators), and procured the ſame free admiſſion, and equal credit, to the teſtimony of the one as the other ſex, in all caſes and ſituations.

Nov. 10. 1674.

THE diſqualifications which are now enforced in practice, ſeem to be chiefly theſe.

Objection to witneſſes. Idiotry.

I. THERE is a diſqualification from defect of intelligence. On which ground are excluded all perſons bereft of reaſon, whether idiots or furious perſons, if they are either conſtantly in this condition, or are ſubject to ſuch frequent returns of their malady, and at ſuch ſhort intervals, that they cannot ſafely be relied on. In regard to him who has only at times been deranged, but at long intervals, it ſeems probable that his teſtimony may be taken, at leaſt *cum nota*, concerning any matter which has fallen under his obſervation in his ſeaſon of ſound health, more eſpecially if it be a recent matter, provided always that no fit of derangement has ſucceeded; for if the fact be otherwiſe, certainly he is not receivable at all. In the trial of Love, and others, for treaſon, it was objected, May 4. 1687.

[1] *Arg. ex l.* 18. *Dig. de Teſtibus.*

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inter alia, to Robert Blair, that he was born, and had always continued and been reputed, a natural fool; and on this head the Court proceeded to take evidence, by the examination of witneſſes, and of the man himſelf [1]; but in the end his teſtimony was allowed. In the ſame trial, it was objected to Henry Adam, and, along with other matters, was admitted to proof, that he was frequently furious, and had ſometimes been confined and bound on account of his diſorder. But it appeared, that it was at leaſt four years ſince he was in any ſuch condition; and he was received, in conſequence, *cum nota*.

Objections to witneſſes. Non-age.

Part 2. tit. 26. No. 5.

PERSONS are deficient in intelligence, owing alſo to immaturity of years, which grounds an objection to them in a double point of view: as they may be liable to miſapprehenſion of facts; and ſtill more, as they may not be ſufficiently confirmed in their attachment to truth, or their ſenſe of the obligation of an oath. Mackenzie is of opinion, that, for theſe reaſons, a minor is not to be received in any caſe, unleſs he be paſt fourteen years of age; and that with reſpect to certain matters, not ſo eaſy to be underſtood, even a greater maturity of years ſhall be required. That at fourteen, a perſon is ordinarily receivable as a witneſs, may be ſhown from many inſtances on record: As in the trial of Alexander

July 30. 1677.

Cunningham for fire-raiſing, where James Swan was admitted, with reſpect to whom the proſecutor alleged no more than that

Jan. 15. 1700.

he was fourteen; and in the trial of Carmichael, a ſchoolmaſter, where James Ewart was admitted, who was fourteen on

[1] "The Lords having examined witneſs anent proving the objectiones againſt "Blair the witneſs, and having queſtioned and examined Blair himſelf, they al-"low him, and admitts him to be receaved a witneſs."

on the 5th of November preceding the trial; and in the trial of Stewart Abercrombie, where Henry Finlay, a boy of fourteen, was in like manner received. But that there is an abſolute and invariable rule, which excludes every one who is under theſe years, how ſimple ſoever the fact in queſtion, and although the individual appear to be competently inſtructed in the nature, and duly impreſſed with the reverence of an oath; this cannot ſo readily be yielded: not only becauſe ſuch a rule ſeems neither to be convenient nor reaſonable in itſelf, but alſo on account of the precedents which may be quoted againſt it. In the trial of Charles Fallon, for a rape, alleged to to have been committed on a damſel hardly arrived at woman's eſtate, the following perſons, her ſchool-fellows, were received and ſworn without objection: namely Betty Tweedale, aged fourteen and ſome months; Mary Sneddon, aged thirteen, and going fourteen; Bell Innes, aged thirteen; Janet Blaikie, aged twelve, and going thirteen. More lately, in the trial of Daniel Mackay, a ſervant of the poſt-office, for ſtealing bank-notes from a packet, Margaret Yule, aged thirteen, was admitted to prove, that, by order of the pannel, ſhe had carried one of the bank-notes to a ſhop, to be there turned into caſh. I have not, however, met with any inſtance of a perſon, male or female, being ſworn as a witneſs, who was under twelve years of age.

Feb. 7. 1718.

Aug. 10. 1775.

July 9. 1781.

Objections to witneſſes. Nonage.

YET it is certain on the other hand, that on ſpecial occaſions, where, from the nature of the charge, perſons of earlier years are neceſſary witneſſes, and are capable alſo of underſtanding the matters in which there is need of their evidence, the Court may and do take their examinations without an oath, *ut proſint ad veritatem indagandam;* leaving it with the jury to put that degree of faith in their relation, to which, on

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weighing the matter and manner thereof, and all the circumſtances of the ſituation, it ſhall juſtly ſeem entitled. This was done in the trial of Philip Standsfield for the murder of his father: James Thomſon, a boy of thirteen, and Anne Mark, a girl of ten years of age, were there examined in that way, (as the record expreſſes it) "for clearing the aſſize." And again, in the trial of Forbes, a ſchoolmaſter, for corrupting the morals of his pupils, two of theſe, viz. Iſobel Alice and Iſobel Goodwillie, gave their declarations on the trial; being under twelve years of age. The ſame courſe has ſometimes been taken with perſons of riper years, when, upon the whole caſe, the Court have ſeen cauſe for declining to adminiſter an oath. William Ranken, a boy of thirteen[1], was examined in this way, on the trial of David Young for fire-raiſing; as was John Paterſon, a boy between twelve and thirteen, in the trial of John Reid for ſheep-ſtealing, with reſpect to certain things which had happened when he was juſt turned of twelve.

Feb. 7. 1688.

July 24. 1758.

July 31. 1738.

Aug. 1. 1774.

Objections to witneſſes. Nonage.

As it thus appears, that the objection of nonage, at leaſt in many inſtances, ariſes from the defect of inſtruction in the nature of an oath, rather than from any diſtruſt of the minor's capacity to underſtand and relate what he has ſeen; ſo the rule on this head is to be taken from the age of the witneſs at the time of his examination, and not at the date of the facts of which he is to give an account. Perhaps, however, this remark ought to be accompanied with two reſtrictions. The facts muſt be of an obvious and ſimple nature, ſuch

[1] "The Lords, in reſpect the crime was occult, and that there were no witneſſes to the direct fact, allowed his declaration to be taken, but refuſed to adminiſter an oath to him."

ſuch as the witneſs might readily underſtand at the time he ſaw them; and farther, they muſt have happened at a period not very diſtant from the time of trial. For if it is otherwiſe; ſo great is the alteration which takes place in any one at this ſeaſon of growing manhood, that we can hardly have reliance on the witneſs, how much ſoever he may be diſpoſed to tell the truth, for a relation of things ſtrictly conformable to his firſt impreſſions. It is true, that in the trial of Gavin Dunbar, Alexander Milne, aged twenty-two, was allowed to depone with regard to an act of murder, which happened (he ſays) when as yet he was "betwix elevin "and twelf yeiris of aidge;" but this teſtimony, as the record expreſſes it, was taken *in retentis, per viam inquiſitionis tantummodò*. In the caſe of Love and others, already mentioned, (and as I preſume for ſome ſuch reaſon), the Lords rejected William Carrith[1]; he having been under twelve at the date of the facts libelled, which was upwards of ſeven years before the trial.

July 12. 1637.

May 4. 1687.

II. THE ſecond ground of diſqualification, is that of partial favour or affection to the proſecutor's cauſe. Which may be inferred on ſeveral grounds, but chiefly that of relation to the proſecutor, or ſuch a ſtate of dependence on him as may naturally beget a diſpoſition in the witneſs to adopt his enmities, or to favour him in his purſuits and deſires. But as to the latter of theſe ſources of partiality; happily, the condition of the inhabitants of Scotland, has in this century undergone ſuch an alteration for the better, through the nurture and

Objections to witneſſes. Connection with the accuſer.

1 "The Lords having examined William Carrith, ane of the witneſs, and "finding by his depoſitione that he was not twelve yeares of age, the tyme of "the committing the crymes libelled, they repell him from being a witneſs."

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and protection of humane and equal laws, which are eaſily enforced in the moſt diſtant quarters of the kingdom, as reduces this ſection almoſt to a blank; and makes it needleſs for me to engage in thoſe controverſies, ſo frequent in our older practice, reſpecting the competency of the proſecutor's ſervants and retainers, his tenants and vaſſals, or perſons in anywiſe ſubject to his power or juriſdiction. Whatever may have been the notions of former times on queſtions of this ſort, (and I think it would be difficult to produce an uniform or conſiſtent train of judgments reſpecting them), every ſuch inferior perſon is a good and unexceptionable witneſs now; ſince all the lieges, down to the loweſt, are equally ſecured as their ſuperiors, to whom they ſtand related, in the free and full enjoyment of all their rights, and againſt any riſk of injury or oppreſſion.

Objections to witneſſes. Near relation.

In the article of relation alſo, and in ſome meaſure owing to the like cauſes, we are now inclined to a leſs jealous rule, than that which Mackenzie tells us was received in his time [1], to the excluſion of all who are within degrees defendant (as he calls it), by blood or affinity, to the parties. But it is neceſſary to diſtinguiſh in this article, according to the ſhape and nature of the proſecution. If the Lord Advocate be ſole proſecutor, certainly even the neareſt relations of that officer are lawful witneſſes; becauſe he inſiſts in his official character only, and for the public intereſt, and not for any advantage of his own, in which he or his connections have any peculiar concern. Thus, Colonel Francis Dundas, brother of the Lord Advocate at the time, was a witneſs in the trial of John Taylor, at his Lordſhip's inſtance, for a riot. Nay more, it is undoubted, that the Lord Advocate, purſuing, may call

July 12. 1792.

[1] Part 2. tit. 26. No. 7.

call for the evidence of the neareſt relations even of the party injured by the crime; for ſo he may, as we ſhall afterwards ſee, for that of ſuch party himſelf, where the injury has not been mortal. And this is true, not only with reſpect to thoſe wrongs which are purely of a patrimonial nature, and cannot, in perſons of well regulated minds, be ſuppoſed to excite a very deep or violent reſentment, but in the caſe even of thoſe perſonal and cruel injuries, which the relations of the ſufferer muſt be ſuppoſed to feel the moſt ſeverely. The utmoſt effect of that conſideration, and even this depends on circumſtances, will be to affect the credibility of the witneſs, and make him admiſſible only *cum nota*, as it is called, and not entirely to exclude him. With that qualification, Rebecca Wallace, widow of the deceaſed George Wood, who had been ſhot in his own houſe, by a party of ſoldiers, whom he reſiſted in the execution of a warrant, was received as a witneſs for the Crown, on the Lord Advocate's proſecution for the ſlaughter. In the trial of Adam Wilſon, for the murder of his baſtard-child, Margaret Arnot, the mother of the child, was admitted a witneſs for the proſecutor ſimply, and without any ſuch reſervation. Mention is made alſo of a much older authority [1] to the ſame effect; the trial of Mackintoſh of Davie, for the rape of Cuthbertſon of Draikie's daughter: The father and mother of the young woman, were there received as witneſſes for the Crown.

Aug. 1. 1757.

Aug. 9. 1747.

Sept. 14. 1658.

Objections to witneſſes. Relation to proſecutor.

BUT, ſhall the complainer's near relations be admitted with equal freedom, in proſecution alſo at inſtance of the party injured

[1] This caſe is quoted on the authority of the MS. Abridgment of the Records in the Advocates' Library. The original record for 1658 is not extant.

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jured himſelf? Upon this head I have found but little in the Books of Adjournal, to ſerve me as a ſure ground for any expoſition of the law. As far, however, as relates to thoſe occaſions, where the proſecutor inſiſts for damages, or other the like peculiar intereſt of his own, and for which the Lord Advocate could not inſiſt; it ſeems probable that his near relations are receivable only when neceſſary, and even then with reſervation of their credibility. For they may juſtly be preſumed to feel ſomewhat of the ſame keenneſs at ſuch times, as their kinſman himſelf, who is deſirous of this ſort of reparation; not to mention, that in ſuch actions which aim at pecuniary concluſions only, the witneſs is not ſubject to the ſame powerful reſtraint from the indulgence of favour and partiality, as where the iſſue is to touch the life or perſon of the accuſed. An objection of this ſort was ſtirred in the trial

July 16. 1744.

of Macandliſh, and others, for an aſſault, at inſtance of Ewan Macneal, who concluded for damages and the pains of law. Before ſwearing Hugh Stewart, "the pannels objected againſt "receiving the above evidence, in regard he the ſaid Hugh "Stewart was nephew to the purſuer's wife. To which the "procurators for the purſuer having anſwered, that there be-"ing a penury of witneſſes, he became a neceſſary witneſs in "this cauſe, there being none in the room but other two per-"ſons.—The Lords declared that they would examine him "only with regard to what happened within the room, lea-"ving the credibility of his teſtimony to the jury."

Objections to witneſſes. Relation to proſecutor.

IT is ſtill a nice queſtion, even where the individual inſiſts for the ends only of public puniſhment and example; in the ſame concluſions for which the Lord Advocate might proſecute without him. On the one hand, it may be urged: Why does the individual proſecute, unleſs he, and by natural preſumption

tion his relations, feel ſome extraordinary intereſt in the condemnation of this pannel; an intereſt which may even be ſuſpected to be paſſionate in ſome meaſure, ſince the Lord Advocate has declined to take charge of the complaint? In return, the proſecutor has to ſay, that ſince the law allows him to inſiſt of himſelf, it cannot at the ſame time entertain an opinion of his proceſs, as calumnious: That the caſe is not the ſame with the proof of crimes, as of contracts and civil tranſactions, to which laſt if the party do not call impartial and habile witneſſes, he has himſelf only to blame; whereas, with reſpect to crimes committed againſt any one, the ſufferer has no choice of the perſons in whoſe preſence he ſhall be wronged, but is attacked probably in the circumſtances the moſt unfavourable to him, and the moſt advantageous to the offender: That with reſpect to ſome crimes, ſuch for inſtance as hameſucken, a proof cannot ordinarily be had in any other way, than by the teſtimony of near connections: And that truly there is leſs riſk of perjury, in favour of the proſecutor at leaſt, in criminal than in civil caſes; ſince, if the event be more intereſting in the former, the reſtraint from falſehood, through the natural feelings of humanity, is far ſtronger too: That on this principle the law proceeds, in admitting even the injured party as a witneſs for the Crown; and that the difference between ſuch a caſe, and a proſecution at his private inſtance, is more in form than ſubſtance; ſince both actions are directed towards the ſame end, and the ſufferer's reſentment is equally gratified in either ſituation. Whether this be a ſufficient anſwer in the general, or whether the effect of theſe conſiderations ſhall be to recommend a diſtinction only in this matter, according to the degree of the relation, and the nature or circumſtances of the crime, I ſhall not take upon me to determine. In point of precedent, what may

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chiefly ſeem to countenance the opinion, that in the neareſt degrees of relation, and in the trial of ordinary crimes [1], ſuch an objection ſhall be liſtened to is, that in one inſtance the Court had in ſome meaſure regard to it, as applied to the caſe even of a relation in baſtardy. This was

Dec. 15. 1690.

in the trial of James Douglas for deforcement, where the Lords gave this judgment with reſpect to John Garrioch, the proſecutor's baſtard ſon: "Refuſes to ſuſtain John "Garrioch a witneſs for proving the crime and injurie done "to the meſſenger his father, but receaves him to inſtruct "the verity of the meſſenger's ſubſcriptione to his execu-"tion of deforcement." But truly that judgment is in nowiſe deciſive of the law; becauſe in a caſe of deforcement, the inſtrumentary witneſſes are in the peculiar ſituation, of being perſons who are carried to the ſcene of action by the party injured himſelf. I obſerve accordingly, that on a former occaſion, in a trial for theft, it was judged otherwiſe with reſpect to a ſon by affinity: I allude to the trial of Francis

Feb. 21. 1676.

Mellum, where, on objection and anſwers, James Wallace was received a witneſs, who had married the proſecutor's baſtard daughter.

Objections to witneſſes. Relation to proſecutor.

But how ſhall this matter be ſettled in a third, and not uncommon ſituation; where the proſecution is *at inſtance* of the Lord Advocate, and alſo of the party injured, inſiſting, both

[1] In the mutual actions between the Maſter of Tarbat and Iſaac Poiſet, on 19th Auguſt 1691, a number of objections were moved to the Sieur de la Maſſie; and this among others, that he was couſin-german to the purſuer Poiſet. According to the words of the interlocutor, this, as well as others, ſeems to be found relevant. But as a proof was actually taken of the other objections of malice, &c. whereas, this of relation ſtood in need of no proof, and ſuperſeded all other inquiry; I muſt conclude, that the interlocutor has been inaccurately drawn.

both of them, for public puniſhment only and correction? This queſtion, it may be thought, is nearly connected with the former: becauſe if the witneſs would be rejected as partial in the ſeparate proceſs of his near relation, he is likely to be no leſs partial in this joint action, where the intereſt of both proſecutors depends on the ſame facts, and both muſt meet with the ſame ſucceſs, or diſappointment, in the iſſue of the trial. Of courſe the objection is ſtronger, if, beſide the ſatisfaction of public juſtice, the private party inſiſt alſo for ſome ſeparate and patrimonial intereſt of his own. Yet I cannot ſay that this has been our practice: On the contrary, I obſerve two judgments, which are unfavourable to ſuch a doctrine; though whether they proceeded on the notion of the Lord Advocate's ſeparate intereſt, as not liable to be affected by the aſſociation of that of another proſecutor, or on the more general ground, of diſregarding objections of this ſort in all caſes, I ſhall not determine. One is the caſe of Robert Frank, who was proſecuted for deforcement, at inſtance of the Lord Advocate, and the meſſenger deforced, and Giles Murray, the creditor whoſe diligence had been obſtructed. Murray of Nevil being offered as a witneſs, he is objected to "as within degrees defendant" to the ſaid Giles. The proſecutor anſwers, that he is a neceſſary witneſs, being a ſubſcriber to the execution of deforcement; beſide that the Lord Advocate and meſſenger are here inſiſting for the pains of law, on the public account. To which the reply is, that the intereſts of all the parties proſecuting are inſeparable and the ſame. "The Juſtice repells the alledgiance and reply in re-"ſpect of the anſwers." It is to be noted, that on conviction, Giles Murray had right to half the pannel's moveables as eſcheat, and that they were adjudged to him accordingly. The other inſtance is the trial of Baſſet Eids and others, at

July 13. 1669.

Aug. 4. 1709.

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at inſtance of the Lord Advocate, and of George Bannerman, for an aſſault. Mary Clerk, the wife of Bannerman, was here admitted a witneſs *cum nota*, in ſupport of the proſecution. The verdict takes ſpecial notice of her evidence; and Bannerman had decree for L. 10 of damages.

Objections to witneſſes. Relation to the pannel.

THUS much with reſpect to the proſecutor's kinſmen. In regard to thoſe of the pannel; it admits of leſs doubt, and the public intereſt requires it, how unwelcome ſoever the neceſſity of having recourſe to them, that they have no exemption from anſwering as witneſſes againſt him, if the proſecutor ſhall ſee cauſe to call on them, for the ends of juſtice. In the trial of the noted Major Weir, his eldeſt ſiſter Margaret, ſwore that ſhe found him in the fact of inceſt, with their ſiſter Jean. William and David Adam, were witneſſes againſt their brother, Andrew Adam, in his trial for forgery. In the trial too of James Macnair, in the Court of Admiralty, for ſinking an inſured ſhip, the Judge-Admiral determined this queſtion, on an objection moved by the witneſs for himſelf. "The "Judge having adviſed the above objection, repels the ſame, "and finds that he is compellable to give evidence againſt "his brother." Nay more; for any authority that I can find, this rule is not ſubject to an abſolute exception in the caſe even of thoſe neareſt of all relations, in whoſe perſons nature muſt ſuffer the greateſt violence, in being put to this extreme trial of their truth. I ſay not an abſolute exception; for although we will not compel the child to bear evidence againſt the parent, if he feel that juſt reluctance to ſuch an office, which may put him in hazard of perjury[1]; yet is he a receivable

April 6. 1670.

Feb. 20. 1710.
Mar. 4. 14. 15. 1751.

[1] It is mentioned in the Lord Advocate's report, relative to the appeal in the caſe of Nairne and Ogilvie, in 1765, That he had intended to uſe Ogilvie's mother

ceivable witneſs, if he be willing. And here I appeal to the caſe of James Macminn; whoſe two ſons, George and James, were produced as witneſſes againſt him, in his trial for murder under truſt; though I muſt take notice that the pannel had confeſſed, and theſe young men were interrogated only concerning the *corpus delicti*, and their own aſſiſtance in concealing the body of the deceaſed. It ſeems not to be clear, whether, in the practice of former times, even a wife might not be called as witneſs againſt her huſband. For I obſerve that in the trial of Hutchinſon, Tenant and others, for theft and houſe-breaking, uſe was made, without any objection having been ſtirred, of the teſtimony of Euphan Smith, the wife of Tenant, as well as of Chriſtian Foreman, his daughter-in-law [1]; though it is true that the queſtions put to her related chiefly to the guilt of the other pannels, which was however very nearly connected with that of her huſband. In the later caſe of Smith and Brodie, which was much of the ſame nature, the Court are ſaid to have been of opinion on the one ſide, that Smith's wife, even if willing, could not be allowed to give evidence againſt her huſband [2]; and on the

Dec. 31. 1711.

Aug. 10. 1714.

Aug. 27. 1788.

mother as a witneſs againſt him, and only abſtained from fear of lengthening the trial, and in the belief that the pannels would call her in exculpation; which they declined to do.

1 Fountainhall informs us, (but this, he ſays, was complained of as a perverſion of law at the time), that in the trial of Douglas of Mains, before the Privy Council, for reſetting traitors, his wife and children were made to bear evidence againſt him. October 14. and 15. 1684.

2 This is mentioned on the authority of the printed trial. For, in the end, the proſecutor having agreed to diſmiſs this woman, on the ſtating of an objection of miſnomer, nothing appears in the record, but that ſhe was diſmiſſed of conſent. "Mary Hubbart or Hubburt, ſpouſe of the ſaid George Smith, being called, "was diſmiſſed, of conſent of the proſecutor, without being examined."

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the other, that ſhe was a good witneſs againſt Brodie, who was under trial for the ſame fact, and on the ſame indictment. Thus, the ſituation of a wife is peculiar in the law, and different from that of any other of the pannel's near relations: in as much as the objection to her is abſolute, and has no dependence on the diſpoſition of the woman to take advantage of the declinature which the law allows her. And truly there ſeems to be great reaſon for ſetting her aſide on ſuch an occaſion: For if ſhe be willing to appear in the trial of her huſband, it can only be from one of two motives; out of affection to him, and to ſave him by her perjury, or elſe to convict him, for the ſatisfaction of hatred and revenge.

EVEN with reſpect to a wife, one exception muſt however be allowed, that of a proſecution at inſtance of the Lord Advocate, for a crime committed by the huſband againſt the woman herſelf; for, in ſuch a caſe, ſhe may be a neceſſary witneſs. Accordingly, in the trial of Elliot, Nicolſon, and Maxwell, for a forgery, conſpiracy, and attempt to poiſon, directed againſt the wife of Nicolſon and her ſiſter; though theſe two perſons did not depone as witneſſes, to the ſpecial aſſize on the trial; yet it does appear that the depoſition of the ſiſter, and the declaration of the wife reſpecting the falſehood of the receipt for poiſon, had been emitted in preſence of the Court, and the forty-five aſſizers, on the 22d of January; and that theſe writings were produced, and given in evidence, in the trial, on the 29th of the ſame month.

Jan. 1694.

Objections to witneſſes. Pannel's agent or counſel.

I SHALL only farther obſerve, as relative to this head of ſpecial connection with the pannel, that his agent or his counſel for the trial, cannot be called as a witneſs againſt him, with reſpect to any circumſtance which has come to his knowledge,

knowledge, after and owing to his employment in that capacity. But here the privilege ends: It does not apply to ſuch things as may be revealed, without breach of the truſt repoſed in him on that particular occaſion. In the trial of Thomas Wilſon for forgery, Andrew Reid, writer in Jedburgh, cited as a witneſs for the Crown, objected for himſelf, that he had acted as agent for the pannel in that trial: but the anſwer was ſuſtained, that he was to be interrogated only concerning ſuch matters which were known to him otherwiſe than as agent; and he was examined accordingly. In like manner, in the trial of Sir Archibald Kinloch, Mr Charles Hay, advocate, was examined reſpecting circumſtances which had been communicated to him as counſel for the pannel's family, but prior to the facts which gave occaſion to the trial.

Jan. 25. 1790.

June 1795.

Objections to witneſſes. Partial conduct.

UNDER the head of partial favour and affection, may likewiſe, with propriety, be reduced, all ſuch behaviour on the part of the witneſs, with relation to the trial itſelf which is going on, as indicates a corrupt or undue zeal in him for the condemnation of the pannel, or, in general, too forward and buſy a temper on the occaſion. As, for inſtance, if he be an ultroneous witneſs; one who comes to give evidence without having been cited. But a witneſs is not ultroneous, becauſe he gives notice of himſelf, as one who ought to be cited; nor even becauſe he comes of his own choice from England, or elſewhere, into the juriſdiction of the Court, to receive his citation; nor becauſe the citation is in ſome reſpect irregular, of which the witneſs is not qualified, nor entitled to judge. It may alſo ſet him aſide, if, in any material degree, he have taken on him the character of agent for the accuſer; as by ſearching for evidence, preparing the charge, ſuggeſting inquiries, or adviſing how to conduct the proſecution. In the trial

Ultroneous witneſs.

Partial counſel.

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trial of Spalding of Aſhintullie, and others, John Rattray was ſet aſide, as far as related to Aſhintullie, but not as to his brother David, becauſe he had been tampering with one of the pannels, and had offered to bring him off, if he would aſſiſt to convict Aſhintullie of the charge. In Love's caſe, it was admitted to proof, before anſwer, with reſpect to Henry Adam, that he had not only been active in purſuing and apprehending the pannel, but had, in different ways, and even with violence, attempted to influence and overawe the other witneſſes [1]. In the end, however, and after proof, this man was received *cum nota*. In the trial of Helen Watt and Alexander Keith, at Aberdeen, for murder by poiſon, Lord Kames ſuſtained the objection of partial counſel to George Keith; who had attended at the precognition, and been buſy in ſuggeſting queſtions to the Sheriff. In the caſe of Nairne and Ogilvie, it was objected to Anne Clark, that it was ſhe who firſt raiſed the report of the pannels' guilt, and that ſhe had been active and induſtrious in ſpreading the opinion of it in the country. Now, it was plain that this was not ſufficient abſolutely to exclude the woman, who, if perſuaded of the fact herſelf, might naturally and juſtly indulge in expreſſing to others her ſentiments in that reſpect. But ſtill ſhe might poſſibly be intemperate in doing ſo, and might ſhow more zeal on the occaſion, than could fairly be aſcribed to her diſlike of vice, or the pure love of juſtice. While, therefore, the Court admitted Anne

Feb. 10. 1673.

May 4. 1687.

Sept. 1786.

Aug. 12. 1765.

[1] "And as to his being active in the perſuit in apprehending, and threatening "the witneſſes, and ſhooting a gunne at their windows, Th[illegible]ordain the witneſs "for proving the ſaid objections to be examined befor the Lords, befor they de- "termine upon the relevancie of theſe poynts to caſt the witneſs." The circumſtance of *firing* the gun was not proved.

Anne Clark as a witneſs, ſtill they "reſerved the conſideration "of the allegeance as to the ſaid Anne Clarke's being the au- "thor of the report of the pannels' guilt till their exculpation; "as alſo, reſerving to the conſideration of the Court, whether "or not any ſpecial expreſſions of malice that may be conde- "ſcended on by the pannels in their exculpation, ſhall be ad- "mitted or not:" Meaning, as I underſtand it, to receive at that time ſuch relevant teſtimony as the pannels ſhould then offer, to eſtabliſh her miſconduct in theſe particulars, and ſo leſſen the credit of her oath.

Objections to witneſſes. Informers.

But, whatever may be the conſequence of an exceſs on ſuch occaſions, it is certain that no objection even to diſcredit, and much leſs to diſqualify a witneſs, can be drawn from the circumſtance of his being the informer, and having given that intelligence to the magiſtrate, on which the pannel has been taken and committed. For, in doing ſo, he ſhows no malice, but diſcharges a duty to the public, which it were to be wiſhed that all would more attentively obſerve. It is indifferent, therefore, in this queſtion, whether the witneſs was called on by the magiſtrate, along with others, to tell what he knew of the matter, and only then informed; or whether he went of himſelf to the magiſtrate, and diſcloſed his ſuſpicions. This was the opinion of the Court, and judgment was given accordingly, in the trial of Murdiſon and Millar, Jan. 8. 1773. ſheep-ſtealers, where it was objected to Thomas Gibſon, that he was one of the perſons who had entered charges with the Sheriff againſt thoſe pannels, and obtained warrants to apprehend them. The ſame doctrine ſeems to have been applied long ago, in the trial of Samuel Smith for houſebreaking; July 4. 1693. even though Faa and Wilſon, the perſons there objected to,

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were liable alſo to ſuſpicion as *ſocii criminis*, and Faa as re-earning a certain reward by every felon whom he ſerved to convict.

Objections to witneſſes. Infamy.

III. A THIRD ground of diſqualification of a witneſs, is infamy of character: a juſt cauſe of excluſion certainly, if it be of the due degree, and be eſtabliſhed in a regular and ſatisfactory way. And in theſe points our Judges ſeem always to have been obſervant of the proper caution and reſerve. To allow a ſummary impeachment of the character of any witneſs, in the courſe of the trial, or to ſuſtain any even the ſtrongeſt teſtimony of a general nature againſt him, as a bad or immoral perſon, is held in our practice to be an improper, and indeed an unfair proceeding, with reſpect equally to the proſecutor and the witneſs: To the proſecutor, who cannot be prepared with evidence on his part to obviate ſuch aſperſions, which may be utterly groundleſs; and to the witneſs, who, according to this courſe of inquiſition, might, without any warning of the challenge, or any opportunity of vindicating himſelf, ſuffer a material injury in his fame: Not to mention the intolerable length of ſuch inquiries, and the raſhneſs, lubricity, and uncertainty ſo incident to all general teſtimony reſpecting matters of this ſort, and the boundleſs field which ſuch inveſtigations lay open to the indulgence of evil paſſions. For theſe reaſons, our Judges uniformly refuſe to liſten to any general challenge, how ſtrongly ſoever it may be expreſſed, of the character of a witneſs, as a diſſolute, or immoral, or unprincipled perſon. Aug. 12. 1765. Of which rule ſuffice it to cite one teſtimony [1], which occurred in the noted trial of Nairne and Ogilvie, for the crimes

[1] The only judgment of an oppoſite tendency that I have met with, is in the trial of Love and others, for treaſon; where the Lords allowed a proof of this, among

crimes of murder and inceſt. It was objected to Anne Clark, one of the chief witneſſes for the Crown, that ſhe was a perſon of evil fame, a notorious liar and diſſembler, a known ſower of diſſenſion in families, and a common whore, who had lived for years in a bawdyhouſe. But to none of theſe reproaches did the Court pay any regard; though to a certain extent they had conſideration of ſome other charges, which were made on the ſame occaſion.

Objections to witneſſes. Infamous character.

Not only is this our rule; but the pannel ſhall not much ſtrengthen his objection, though he drop thoſe general imputations of evil fame, and offer immediate proof by teſtimony, of infamous crimes committed by the witneſs. The proſecutor is not to loſe his evidence, but on ſure and ſatisfactory grounds; and the witneſs is not to be *made* infamous in this trial, on a ſummary, unexpected, and *ex parte* inquiry: He muſt be ſhown to be already infamous, by his conviction in courſe of law, of ſome crime inferring infamy, after a trial where there was equal opportunity of eſtabliſhing his innocence as his guilt. This has been the ſettled rule of our practice, if not from the earlieſt times, at leaſt ever ſince that period when things were brought into a more improved order, through the new eſtabliſhment in 1671. In the trial of Love and others for treaſon, the pannels excepted to Henry Adam, for ſeveral reaſons, and eſpecially becauſe he

May 4. 1687.

mong other objections, to Henry Adam, that he is graceleſs and debauched, drinks the devil's health, and boaſts that all the three Perſons of the Trinity will have enough to do to ſave him. After proof, he was admitted *cum nota*. May 4. 1687.

It has been made a queſtion whether the common executioner is ſuch perſon as may be a witneſs; and Mackenzie, Part 2. tit. 31. No. 7., ſays that he had known the Lords of Seſſion refuſe him. But I obſerve that he was admitted in the trial of John Pringle for theft: June 20. 1715.

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was a thief. But the Lords gave this interlocutor: "And "as to the objectione anent the witneſs his being a theiffe, "the Lords repell the ſame in reſpect he was never convict "thereof." In February 1775, Margaret Fairlie, being proſecuted in an inferior court, for inſtigating certain boys to ſteal, offered a bill of advocation on this among other grounds, that the charge was meant to be proved by the teſtimony of the very boys, who were mentioned in the libel as guilty of the acts of theft, and who, in this trial at leaſt, muſt be held for infamous and unworthy of credit. The Lords refuſed the bill of advocation. In the trial of Bruce and Falconer, for breaking into the office of the Dundee Bank, and afterwards in the trial of Dick for the ſame offence, it was ſtrenuouſly objected to Alexander Macdonald, (who indeed was ſoon after convicted of forgery), that he was a diſhoneſt and infamous perſon, and had been guilty of ſeveral acts of theft; whereof immediate evidence was offered to be given. But here too, as in all former caſes of the like kind, the Lords ſuſtained the anſwer[1], that no conviction of theſe crimes was on record againſt the man, and that he could not be convicted of them at this time, nor in this ſummary faſhion.

Feb. 18. 1775.

Aug. 13. and Nov. 24. 1788.

FARTHER

[1] "They repel the objection ſtated to the admiſſibility of the witneſs, and al-"low him to be examined."

In an abridgment of the Books of Adjournal, in my poſſeſſion, it is mentioned, that in the trial of James Gray, for writing an incendiary letter, (July 11. 1737), it was objected to William Brown, a boy of fifteen, that he was of an infamous character, had been repeatedly taken with ſtolen goods upon him, and was only liberated from gaol upon finding ſecurity for his good behaviour. All which the Court repelled, though offered to be proved, in reſpect no ſentence had ever paſſed againſt him. I cannot find any ſuch proceedings in the record; but the practice was far from being uniform at that time, as to the inſerting ſuch debates or interlocutors.

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Objections to witneſſes. Infamy.

FARTHER ſtill; it is not even on every trial and conviction of a crime that our Judges have ſuch entire reliance, as to allow it the power of affixing infamy to the convict, and caſting him out of the number of citizens who are to be credited on oath in a court of juſtice. In general, this high power is not to be aſcribed to a conviction before thoſe inferior magiſtrates, ſuch as Juſtices of the Peace and magiſtrates of burghs, who are not ſuppoſed to be ſo converſant in legal proceedings, and are in the uſe of trying ſummarily, themſelves alone, without calling the aſſiſtance of a jury. Though ſtill the Lords will not entirely diſregard a conviction of this leſs ſolemn kind; but, allowing the witneſs to be received, will reſerve its effect as to his credibility, or the degree of faith which his evidence ſhall have a claim to with the aſſize. A few inſtances will fully illuſtrate this matter. In the trial of Brown and Wilſon for murder, *infamia juris* is objected to Janet Greig, and two ſentences are produced in ſupport of the objection: one, a ſentence of the Bailies of Alloa, ordering her to be drummed through and baniſhed from that burgh, as a thief; the other, a ſentence of the Juſtices for Stirlingſhire, finding her guilty of riot and robbery, and appointing her to be ſcourged, and confined in the houſe of correction, and afterwards baniſhed from that county. But, ſays the proſecutor, theſe decrees are not ſufficient to affix the ſtamp of infamy to this woman, ſince neither of them proceeds on conviction by the verdict of a jury. The Court received her accordingly[1], reſerving her credibility to be conſidered with the aſſize. The like judgment was given in the trial of George White for murder; where it was ſhown in

Aug. 11. 1773.

Aug. 4. 1788.

1 "They repel the objection, and allow the witneſs to be examined, reſerving "the conſideration of her credibility to the jury."

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in the regular way, that Jean Stevenſon, the witneſs objected to, had been baniſhed from the Gorbals of Glaſgow, as a bawd and diſorderly perſon [1]. A third inſtance is to be found

Aug. 27. 1788.

in the trial of Smith and Brodie, as relative to a witneſs named John Brown [2], who had been baniſhed by the Juſtices for Stirlingſhire, as a thief. Yet it will be proper to take notice of one judgment, as far as I have obſerved the only one of this complexion, which ſuſtains the objection of *infamia juris*, in reſpect of the ſentence of a Sheriff-court, not proceeding on proof or conviction of any ſort, but on the pannel's own petition and enactment only; which in point of form at leaſt (but the Court had thought it was otherwiſe in point of ſubſtance) does not even imply a confeſſion

Mar. 13. 1786.

of the charge. I allude to the trial of Walter Roſs, for pocket-picking [3]; where William Boyd was ſet aſide, who had been baniſhed in this form by the Sheriff of Mid-Lothian, in purſuance of a libel which charged him with ſundry acts of theft.

Objections to witneſſes. *Infamia juris*, how proved.

To the effect which we are now conſidering, a conviction can be proved only in the beſt, and moſt authentic courſe of evidence, according to the cuſtom of the country where the ſentence

1 "They repel the objection ſtated againſt the admiſſibility of the witneſs, "and allow her to be examined, reſerving the objection as to her credibility to "the jury."

2 "They repel the objections, and allow the witneſs to be examined, reſer- "ving the credibility of his evidence to the jury."

3 "They ſuſtain the objection offered to the witneſs, and find that his evi- "dence cannot be admitted."

ſentence has been given. This, with us, is by what is called an extract, or official copy of the proceedings and ſentence, under the hand of the clerk of Court; and in England and Ireland, it is by what they term an exemplification, which is not complete without the ſeal of Court alſo. In the trial of William Deane [1], for coining halfpence, it was objected to Joſhuah

Sept. 26. 1729.

[1] This caſe is not cited on the authority of the record, (which is ſilent reſpecting any objection to the witneſs), but on that of certain MS. notes in the hand of Mr Charles Areſkine, his Majeſty's Solicitor at the time, and written by him on the printed indictment in the caſe, which the author was favoured with an opportunity of conſulting. The notes themſelves are verbatim as follows: "Againſt "Joſuah Deans, it was excepted that he had been pillored in Ireland for the *cri-*"*men falſæ monetæ*, and ſo was an infamous perſon; and for proof of this, offer-"ed a copy of a judgment in the King's Bench of Ireland, ſigned, as it was ſaid, "by the proper officer, and affirming it to be *vera copia*, and in ſupport of it, of-"fered to adduce witneſſes who had ſeen him upon the pillory. 2*dò*, It was al-"ledged that he was *ſocius criminis*, and that a remiſſion which was then put in-"to his hands ought not to be regarded, becauſe it was not paſt the ſeals, being "only a warrant. To this it was anſwered for the Crown, *firſt*, That unleſs "there had been an examplification under a ſeal, it could make no faith. That "as to the *proof* offered to be brought, ſuch witneſſes could not prove the tenor "of the ſentence upon which he was pillored, and conſequently could make out "nothing but the fact of his being pillored, which was a puniſhment often in-"flicted for crimes that did not infer infamy, and conſequently the objection was "not offered to be habilly proven. But then, 2*dò*, It was urged, that ſentences "pronounced in a different nation, did not render one infamous *extra territo-*"*rium*, becauſe the crime might be infamous in one nation, that was not in ano-"ther, and that decrees of foreign courts could not receive execution *extra ter-*"*ritorium*, without a new trial. 3*tiò*, That the *crimen falſæ monetæ* was one of "the excepted crimes; and conſequently, a witneſs otherwiſe exceptionable, or "*ſocius criminis* ought to be received; and particularly, an inſtance was offered, "where in a trial for forgery of a bill, ſaid to be accepted by Kirk of Bogrie, "againſt one Gilchriſt, and another, Brodie, Gilchriſt being convict, his teſtimo-"ny was, nevertheleſs, taken in order to convict Brodie. As to this laſt anſwer, "ſeveral of the Lords ſeemed to think it was good: one of them doubted, name-"ly

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Joſhuah Deane, that he had been convicted and had ſtood in the pillory, for the like crime, in Ireland; in evidence whereof, the pannel produced a copy of the proceedings, ſigned, as he ſaid, by the proper officer; and he offered to examine witneſſes, who had ſeen this man undergo the ſentence of the law. The Lord Advocate inſiſted, that by the cuſtom of Ireland, the ſeal of court was neceſſary to authenticate theſe proceedings; and that though witneſſes might prove, that the man had ſtood in the pillory, yet they could not prove the cauſe why, nor the tenor of the ſentence. Joſhuah Deane was received accordingly.

Infamia juris, if removed by pardon.

See Mackenzie, Part 2. tit. 26. No. 6.

THE law of Scotland differs from that of England in this article alſo, that according to the latter, a pardon completely does away the conviction and ſentence, ſo as not only to ſave the convict from the appointed puniſhment of the law, but reſtore even his good name and civil ſtate, and rehabilitate him as a witneſs. With us, on the contrary, and perhaps with as good reaſon, a pardon is conſidered only in the former point of view, and does not waſh away that ſtain of infamy, which, in certain caſes, is the natural conſequence of conviction. In judging of pardons, as relative to convictions in the Courts of England, we cannot however apply to them the notions of our own municipal cuſtom: but, if we ſo far have regard to thoſe foreign ſentences, as to reject a witneſs on account of them; ſo muſt we allow this diſability

" ly R.; and another expreſſed his opinion againſt it, namely N.: however, all " of them having agreed that there was no ſufficient proof of the ſentence againſt " him in Ireland, he was received and examined. Neither was it regarded that " the remiſſion had not paſt the ſeals. Theſe objections and interlocutors of the " Lords were not marked in the Books of Adjournal."

ability to be removed, according to the rules of the ſame law which at firſt impoſed it. It was ſo determined in the caſe of Smith and Brodie, on the objection to John Brown, who had been ſentenced to tranſportation in the Quarter-ſeſſions of Middleſex, and had afterwards received a pardon, to rehabilitate him as a witneſs againſt thoſe noted offenders. Aug. 27. 1788.

RESPECTING thoſe pardons which are ſometimes, though more rarely given before conviction, of all guilt and concern, real or ſuppoſed, in certain crimes, there is no room for the like diſtinction between the law of this, and of the neighbouring kingdom. Becauſe the object of this ſort of pardon, is not to reſtore the fame of the perſon who receives it, which is always entire in the eſtimation of law, until he be convicted; but to obviate only all ſuſpicion of the proſecutor's influence over him, and place him in a ſtate of freedom and ſecurity as a witneſs. In the trial of Wilſon and Macdonald for theft, John Syme, priſoner in the tolbooth of Edinburgh, was therefore freely received; having been brought from gaol into Court, and having there got delivery of a pardon, which proceeds on the ſpecial narrative of his Majeſty being informed that he would, if pardoned, be a ſerviceable witneſs: "*talem eſſe declaraverit, qui ſcit quod ad reatum ſociorum* "*et concomitantium in furto ſupra dicto,* (being the act of theft "charged in the libel), *ſed nequit uti tanquam teſte in illos, donec* "*noſtram gratioſam remiſſionem pro dicto crimine et alio delicto ſupra* "*mentionato receperit.*" Nov. 11. 1751.

IV. I HAVE now enlarged ſufficiently on the objection of infamy: Let me paſs to another diſqualification, that of the witneſs bearing enmity to the pannel. A circumſtance which in our cuſtom is reckoned ſo material, that every witneſs,

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even though not challenged, muſt purge himſelf on oath of all ſuſpicion of it, before he give his evidence on the matter of the libel; but of which ſuſpicion he ſhall in certain circumſtances not be allowed to purge himſelf, but ſhall ſtraightway be rejected, as one who may be diſpoſed falſely to take ſuch oath, on purpoſe to indulge his malice. It is not, however, nor ought it to be, a ſlight matter, nor a vague proof, that will be held ſufficient to bring a witneſs under this moſt diſcreditable imputation. And in the firſt place, to deſcribe the matter negatively, it is not preſumed with reſpect to the party injured by any crime, that he feels ſuch a reſentment of the wrong, whatever it be, as ſhall bias or ſtrain his teſtimony in the trial of the perſon accuſed, who is in hazard of his deareſt intereſts. Happily, there is no reaſon to believe, that ſo malignant and rancorous a temper is the ordinary diſpoſition of the inhabitants of this land. Beſides, with reſpect to ſeveral of the moſt frequent crimes, from the very nature of them, there can be no hope of convicting the offender, nor even of eſtabliſhing the *corpus delicti*, unleſs the teſtimony of the ſufferer be allowed; ſo that to liſten to any ſuch objection, would be to encourage the worthleſs with the almoſt certain proſpect of ſecurity in thoſe dangerous tranſgreſſions. Although, therefore, in our older practice, many diſtinctions were obſerved touching the ſituations wherein, and the extent to which, the evidence of the party injured might be received; yet now, for more than half a century, we have hardly ſeen an inſtance of debate on ſuch an objection. I will not therefore multiply caſes on this head, but confine myſelf to a few. One of the judgments which chiefly ſerved to eſtabliſh the preſent rule, was given in the trial of James Cranſtoun for robbery, where the point was fully debated. And the ſame law was again applied, after hear-

Sept. 10. 1723.

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ing an argument, in the trial of Mathew Foulden, for a rape or attempt to raviſh, June 19. 1732; in the trial of Wilſon for robbery, Auguſt 6. 1743; and in that of John Irvine, alſo for robbery, September 24. 1744.

Objections to witneſſes. Enmity to the pannel.

To proceed then with the farther expoſition of the law on this head. It is not ſufficient to diſqualify a witneſs on the ground of enmity, that he is not a wellwiſher to the pannel, nor even that he has been known to indulge in unbecoming and intemperate expreſſions with reſpect to him. Though the witneſs be none of the pannel's friends, yet may he be quite a ſtranger to that malignant and wicked feeling which would lead him into temptation of perjury; and even his threats or wiſhes of revenge, if at any time he has given way to ſuch, are probably to be conſidered as the haſty effuſions of paſſion at the moment, more eſpecially if there be no adequate or likely cauſe of mortal hatred between the parties, and not as concluſive evidence of the ſerious purpoſe and habit of mind of the man. Which preſumption if the witneſs will publicly confirm with his oath to his freedom from all ſuch mortal enmity, he ſhall be allowed to do ſo, and ſhall ſtand acquitted of the ſuſpicion; at leaſt thus far, to be admiſſible *cum nota*. Moreover, this is truly a neceſſary rule, in the way of ſafeguard againſt the cunning of the pannel's own friends and aſſociates; who, on being called to bear evidence againſt him, might otherwiſe contrive to diſqualify themſelves, by aſſuming the language of enmity and revenge.

Objections to witneſſes. Enmity to the pannel.

It is true, that in a few inſtances, the Court have liſtened to an allegation of malicious words, being either very ſtrong in themſelves, and frequently repeated, or elſe having

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the ſupport of ſome other circumſtance in the ſituation of the witneſs. In the trial of Spalding of Aſhintully, Alexander Rattray was ſet aſide, having ſaid [1] on ſeveral occaſions "that he wiſhed to waſh his hands in the pannel's heart's "blood." Another inſtance is in the trial of the mutual libels, for murder and hameſucken, between the Maſter of Tarbat, and Iſaac Poiſet and others: It was there found relevant to diſqualify Monſieur De la Maſſie, that he had threatened to take perſonal revenge of the Maſter of Tarbat, if he got not juſtice otherwiſe. But this witneſs was a near relation of the deceaſed, and had himſelf been wounded in the very broil which gave occaſion to the ſlaughter. In the trial of Daniel Daveron, the Lords allowed a proof with reſpect to Thomas Ryder, of his having openly declared a purpoſe to take away the pannel's life, if in his power. But this man was otherwiſe liable to ſuſpicion, as *ſocius criminis* with the pannel in the fact libelled; and inſtead of oppoſing the inquiry, the proſecutor ſaid "that he had no objec-"tion, if the Court ſhould think proper, that the pannel be "allowed the proof craved." However, after taking ſome depoſitions, the Court found the allegation not ſo ſupported, as to diſqualify the witneſs.

Feb. 10. 1673.

Aug. 19. 1691.

Dec. 11. 1786.

BUT, notwithſtanding a few ſuch inſtances, it has long been the ſettled maxim and diſpoſition of our practice, not to pay regard to bare words of enmity, neither accompanied with any malicious deed, nor originating in any ſufficient or ſubſtantial cauſe, which can be ſuppoſed to infuſe

[1] "Having conſidered the objections againſt Alexander Rattray, fand the ſame "relevant and proven; and therefore, repelled him both as to Aſhintullie and "his brother."

fuſe ſuch bitter hatred into the heart. The proceedings on the following occaſions, are all of them evidences, leſs or more, of this rule of judgment. In the trial of Patrick Gray for beating his father, Robert Cock depones *in initialibus*, "That being informed that the pannel bearis him ill hatred, "he cannot be altogither frie of malice againiſt him, bot "that he bearis him no deadlie malice or evill will;" whereupon "the Juſtice admittis him witneſs *cum nota*." In the trial of Robert Carnegie of Newgate, the objection to James Martin is repelled, that he and the pannel had put each other under caution of lawborrows, "in reſpect the lawborrows was bot for a "civil caus, and they wold purge him of partiall counſell." In the trial of John Niven for leaſing-making, and on the objection to William Tarbet, the Lords allow a proof of the alleged enmity; but in the end the witneſs is received, the evidence having amounted to this only, that Tarbet had been heard to threaten revenge, and that he would have amends of the pannel. In the ſame caſe, the objection of enmity having been ſtated to Michael Seaton, and two perſons having ſworn, that fourteen years ago, Seaton had threatened to be revenged on the pannel for taking him with caption; the Lords gave this interlocutor: "Finds that the *inimicitiæ* are not *capitales*, "being fourtein yeares ſince they were expreſſed, and that ſince "they have converſed together in the houſe and company of "the ſaid Michael Seaton, and that the words were vented "on a civill account, and theirfor ſuſtaine the witneſs." In the trial of Samuel Smith, William Faa is received as a witneſs, notwithſtanding this objection[1] among others, that he had violently

Feb. 8. 1664.

Nov. 11. 1672.

July 1680.

July 4. 1693.

[1] "The pannell being interrogate at what time it was that *Faa* threatened to "kill him, he declaired, that it was at Skirline faire, after Lambas 1692, and "before the time of robbing the houſe of Pennycuick, libelled.

"Having

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Oct. 1729.

violently threatened the pannel's life. In the trial of William Dean [1] for coining, it was objected to Bethuel Blythe, a

" Having conſidered the objections, with the anſwers and debate following " thereupon, with the pannell's declaration, anent the tyme of the alleadged " threatening; they repell the ſaid haill objections."

[1] The cuſtom was not uniform at this time, with reſpect to the marking of objections to witneſſes in the record. This caſe, accordingly, is not given on the authority of the record, but on that of Mr Solicitor General's notes, (Mr Charles Areſkine, afterwards Lord Juſtice-Clerk), written with his own hand, on the printed indictment. The notes are verbatim as follows: " Upon this interlocutor a proof " was led, and two of the accomplices, namely Joſuah Dean, and Bethuel Blyth, " a boy of fourteen years of age, being adduced as witneſſes, ſeveral exceptions " were offered againſt them; particularly as to the laſt, it was ſaid he had malice, " and had uttered ſtrong expreſſions, ſuch as he would do all in his power to " hang him. It was anſwered for the proſecutor, that ſuch expreſſions could not " found an exception, unleſs a preceding cauſe were aſſigned and proven, from " which *inimicitiæ capitales* might probably ſpring, otherwiſe if a pannel prevailed upon any of the witneſſes for the Crown, to lie, before they were adduced, " upon this point of their having malice, which did not ſeem to be very hard in " this age, when even ſo little regard is paid to truth, confirmed by the religion " of an oath, the puniſhment of crimes would become impracticable. Upon this " anſwer, the Lords having put it to the pannels' lawyers, if they offered to " prove a preceding cauſe of ſuch enmity, and they declaring they could do it no " otherwiſe, than from the expreſſions had by the witneſs; he was called and examined, and when purged of malice, the boy repeated the ſame thing, and " ſeemed to ſtand to it: Whereupon the witneſſes who were to have been adduced " to prove the emiſſion of the words, being called and interrogated, whether they " had been with the pannel, and acquainted him of what the witneſs had ſaid, " they acknowledged they had; and upon this the Court was moved to commit the " two witneſſes, as having tampered with the evidence, and the boy, on account " of his very ſtrange behaviour; and all the three were put into the cuſtody of a " macer, until a warrant could be ſigned. In the mean time, the boy beginning to " relent, and be ſenſible of the wrong he had done, and probably fearing the " event, expreſſed himſelf that he was willing to be examined; and the Court, " upon a motion, called him again before them, where he acknowledged he had " no

a boy of fourteen years of age, that he bore malice to the pannel, and had ſaid that he would do all in his power to have him hanged. But the Court having put it to the pannel's counſel, to ſay whether they would prove any preceding cauſe of enmity, and they having declined to do ſo, the boy was called in and ſworn. However, on being examined *in initialibus*, he confirmed all that had been alleged againſt him. But a ſuſpicion now ariſing that he had been tampered with by the pannel, and by the witneſſes who were to prove his previous emiſſion of threats; and this on examination of thoſe perſons appearing to be the caſe, whereupon both he and they were put into the cuſtody of a macer; the boy then began to be afraid, and having at length confeſſed that this was a falſehood concerted with the pannel's friends, he was received as a witneſs, reſerving however to the aſſize to conſider how far it ſhould weaken his teſtimony, that he had wavered in this manner.

Objections to witneſſes. Enmity to the pannel. Aug. 31. 1736.

In the trial of James and Ronald Drummond for murder, Patrick Murray acknowledged, in the end of his depoſition, "That he bore them ill-will, on account that their father "had wrongouſly poinded his effects, and herried him, at "which Ronald was preſent, and afterwards ſold the depo-"nent's cows that were poinded, but that his malice was not "of that degree, that he would ſwear falſely againſt them; "which

"no malice, and named two perſons who had prevailed upon him to ſay ſo, in "order to ſave the pannel. Upon which the perſons who tampered with him "were committed, and he was received as a witneſs, and his depoſition marked "without any *nota*; it being left with the jury, upon their memories, how far "it invalidated the ſtrength of his depoſition, that he had varied in that man-"ner."

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" which was remitted to the jury's conſideration." Robert Murray, in like manner, freely acknowledged, " That " he bore them ill-will; and being interrogate what was " the reaſon of his ſo doing, deponed that it was becauſe " their father Robert Roy had grievouſly oppreſſed him and " his family, in relation to a feu which the deponent's father " had purchaſed from the Duke of Athol, out of which the " deponent's father was kept five years by the ſaid Robert " Roy, and was at length forced to give a tack to ſome of " the ſaid Robert Roy's friends, of part of the ſaid lands, to " his great hurt."—" The Lords reſerved the conſideration " of the objection, and what he had now acknowledged, to " the jury, and admitted the witneſs to give his evidence."

June 4. 1752.

In June 1752, Charles Sheddan, being proſecuted for theft in an inferior court, offered a bill of advocation, wherein, beſide other matters, he complained that among the witneſſes meant to be uſed againſt him was one Patrick Wyllie, an apprentice of his, whom he had diſmiſſed for evil practices, and who had ſince threatened to make him repent of having done ſo. The Lords refuſed this bill of advocation, *ſimpliciter*.

Aug. 1765.

In the caſe of Nairne and Ogilvie, Anne Clarke was received againſt the pannels, notwithſtanding the allegation of deadly malice, and threats to bereave them of their lives: But the Court reſerved to themſelves to conſider [1] how far the pannels ſhould be allowed to invalidate her evidence, by proving in exculpation, ſuch expreſſions of malice as they might afterwards ſpecify. The like interlocutor was given

1 " Reſerving to the conſideration of the Court, whether or not any ſpecial " expreſſions of malice that may be condeſcended on by the pannels in their ex- " culpation, ſhall be admitted or not."

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given on the objection to another witneſs, Catharine Campbell, late ſervant to one of the pannels, who, on being diſmiſſed the ſervice [1], was alleged to have threatened revenge. In the trial of Brown and Wilſon for murder, it was objected to Martha Wilſon, that ſhe had threatened ſince citation, that, "right or wrong, ſhe would bring the pannels to "the gallows." But this ſtory not being confirmed with any overt fact, and no cauſe being mentioned why the woman ſhould be in any ſuch diſpoſition with reſpect to the pannels, the Lords did not think it proper even to allow a proof of the allegation. I ſhall mention but one caſe more. Andrew Clark, in his trial for murder, objected to Ann Young, that ſhe had repeatedly threatened to ſwear away his life, and had aſked money of him, to buy off her evidence, and that ſhe was, moreover, a diſſolute woman, and unworthy of credit. The proſecutor affirmed, that in truth ſhe was a friend and confident of the pannel's, with whom he had concerted this device, to diſqualify her; as would appear on examining her *in initialibus*. Which being done, and the fact appearing to be ſo, the objection was repelled [2].

Aug. 11. 1773.

Dec. 6. 1790.

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[1] "Reſerving to the conſideration of the Court, whether or not any ſpecial "expreſſions of malice, and the cauſe thereof, that may be condeſcended on by "the pannels' in their exculpation, ſhall be admitted or not."

[2] In a collection of papers in criminal caſes, now in my poſſeſſion, and which appears to have been made by Mr Hamilton Gordon, advocate, I find this note written upon the papers in the trial of Chriſtopher Hog, in December 1720.

"Malice being objected againſt Daniel Sheils, another of the purſuer's wit-"neſſes, the Lords found it neceſſar to prove not only threatning to do a miſ-"chief, but that there was a previous quarrell, which laſt was found probable by "the oath of the witneſs objected againſt, who having on oath acknowledged a "previous quarrel, the Lords demurred to ſuſtaine it as a ſufficient *inimicitiæ* "*capitales*

CHAP. XIII.

Objections to witneſſes. Enmity to the pannel.

THE reſult of this inveſtigation therefore is, that thoſe perſons only are diſqualified on the head of malice, who can be ſhown, by ſubſtantial acts and deeds, to have been in a ſtate of hoſtility with the pannel, or with reſpect to whom a preceding and ſufficient cauſe of capital enmity can be proved. Thus, in the trial of Spalding of Aſhintully, it was ſuſtained to diſqualify John Rattray, that he had indulged in vindictive expreſſions againſt the pannel, had been engaged in various feuds with him, and had once been preſent at an aſſault of him by a party of men in arms. In the trial of Cunningham for fire-raiſing, a perſon of the name of *Baird* was ſet aſide, becauſe, recently before the fact, he had been engaged in a quarrel with the pannel[1], in which they violently beat and drew blood of each other. More lately, in the trial of Edgar Wright for an aſſault, it was proved againſt the chief witneſs, Duncan Henderſon, that he had fired a piſtol at the pannel, with intent to kill him; and Henderſon in conſequence was ſet aſide.

Feb. 10. 1673.

July 30. 1677.

Dec. 15. 1788.

Objections to witneſſes. Intereſt in the iſſue.

V. THERE is yet another circumſtance which may ſometimes diſqualify a witneſs; that of his having an intereſt in the conviction of the accuſed. Thus, in the trial of Rutherford, Deas and others, for uſury, John Learmonth, one of the debtors alleged to have paid the uſurious profits, was admitted

Nov. 22. 1664.

" *capitalis* required by law; but after the witneſs was againe ſworn, and purged " of malice in common form, he deponed he bore the pannel ill-will; where- " upon he was caſt."

1 " Mr John Kleis objects againſt Andrew Baird, that he cannot be receaved " a witneſs, becauſe ther is *inimicitiæ capitales* betwixt him and pannell: In ſua " fare as eight days before the committing the cryme libelled, he and the pan- " nall beat and bleed each other.—The Lords found the objection relevant, and " proven by the ſaid Andrew Baird's oath."

ted to give teſtimony; but it was only *cum nota*, and after renouncing all benefit which might ariſe to him, under the ſtatutes, from the ſucceſs of the proſecution. And afterwards, on debate, in the trial of James Wilſon for the like offence, Nov. 11. 1667. George Home and Alexander Home, debtors and informers, were ſet aſide [1], on account of their intereſt as ſuch in the iſſue, For the like reaſon, in a caſe of deforcement, the private party whoſe diligence has been hindered, is not a habile witneſs, as I take it, even in the Lord Advocate's proſecution; unleſs he will renounce that intereſt which the ſtatutes give him in the goods of the convict, both as eſcheated, and for payment of his debt. As to trial alſo for deforcement of a revenue-officer; if it take place on any of thoſe ſtatutes which beſtow a reward, or ſome part of the penalty, on the informer, in caſe of conviction, it may be doubted whether the officer be a competent, or at leaſt an unexceptionable witneſs. Such a queſtion was argued in the informations on the caſe of David Coulton, as relative to the teſtimony of Dec. 4. and 8. 1738. John Wright, who had claim, as informer, to a reward of L. 50, on the conviction of the pannel, in terms of a ſtatute of the 9th of Geo. II., which was the ground of the indictment. It is not marked in the record [2], that any judgment was given on this objection; but it is certain that Wright was not exa-

 mined,

[1] See Commentaries on Deſcription of Crimes, vol. ii. p. 400, 401.

[2] In an abridgment of the records of this period, which is in the poſſeſſion of the Author, it is marked that the objection to Wright was ſuſtained. Perhaps the Lord Advocate, on learning the opinion of the Court, had not perſiſted in offering him as a witneſs; and for that reaſon, the clerk has not minuted any interlocutor or objection. Indeed, it was not the uniform practice of thoſe times to enter ſuch matters, or the interlocutors reſpecting them, on record.

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mined, although, as being one of the only two perſons who were preſent on the occaſion, or knew any thing of the matter, his evidence was indiſpenſable to the proſecutor's cauſe; which accordingly failed of ſucceſs, being ſupported with the teſtimony of one witneſs only. If this be a good exception, there ſeems to be equal room for heſitation with reſpect to any offer of reward for the diſcovery of a criminal, if payable only in the event of his conviction, whether this be not a lawful cauſe of rejecting, or at leaſt diſcrediting the informer who is to receive it. For although, in point of form, this money is not a bribe to him for appearing as a witneſs, and although his teſtimony may be true in the main; yet is it very plain, that he lies under a temptation to make it as full and concluſive as he ſafely can, that he may earn the promiſed reward.

Objections to witneſſes. Intereſt in the iſſue.

THESE things having been obſerved on the one ſide, it may be proper duly to guard this rule on the other alſo; leſt it be underſtood to have a broader and more extenſive application than our practice has allowed it. And firſt, it appears from what has already been obſerved, that no diſqualification attends that ſort of intereſt, which lies in the juſt and natural deſire to ſee the tranſgreſſor puniſhed, who has done a wrong to one's ſelf, or one's near relations. Neither is it ſufficient, that the witneſs has even a patrimonial intereſt in convicting the pannel, if it be ſuch as is naturally concomitant of the crime libelled, and ariſes out of the pannel's own act and deed: That intereſt, for inſtance, which one who has loſt his goods by theft or robbery has, to recover them out of the hands of the thief or robber. One whoſe name has been forged as accepter or indorſer of a bill, has in like manner an intereſt to prove

prove the forgery, that he may not be liable for the debt: Nay, it may be argued that he is under ſome temptation to ſwear to the forgery even of a true bill, to avoid the diſcharge of his juſt and lawful obligation. And in truth, it may be proper, that one who ſtands in this peculiar ſituation be received with reſervation only of his credibility, to be conſidered by the aſſize; and this the more eſpecially, as in caſes of this ſort, very unlike herein to thoſe of murder and robbery, and moſt others, not only the guilt of the perſon accuſed, but even the *corpus delicti*, may depend on his ſingle teſtimony, and be known with certainty to him alone, of all the world. On the other hand, for that very reaſon, his teſtimony is indiſpenſable to the detection of ſuch dangerous offences: and as there is little reaſon to believe that there are many perſons, who, from ſuch ſordid motives, are capable of the deſperate malignity of ſwearing away the life of another; ſo, with the qualification above mentioned, his evidence muſt be received. This was the reſult of the debate on that head, in the trial of Thomas Wilſon, for forging the acceptance or indorſement of Dr Lindſay [1], Thomas Brown, Andrew Huggan, and William Herd, to certain bills; all which perſons were allowed to depone, reſerving their credibility to be conſidered by the aſſize. Jan. 25. 1790.

Objections to witneſſes. Intereſt in the iſſue.

If our practice does not always pay much regard to an immediate and material intereſt, ſuch as that above ſpoken of; much leſs will it exclude any one on account of a trifling intereſt, or one which is contingent only and uncertain,

1 "They repel the objection to the admiſſibility of the witneſs, (Dr Lindſay), and allow him to be examined, reſerving all objections to his credibility to the jury."

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tain, or which is founded on nice and ſubtile conſiderations, more likely to be ſuggeſted by the ingenuity of counſel, than to enter into the mind of the witneſs himſelf. Of this ſort, was that exception taken to the teſtimony of the gaoler in the
July 23. 1673. trial of Irvine of Hilton, for breaking priſon; in as much (ſaid the pannel) as he has an intereſt to prove the libel, being himſelf reſponſible for the eſcape of his priſoner, if it happened otherwiſe than by force. The Court thought that this was too remote and doubtful an inference, and therefore
Jan. 8. 1773. overruled the objection. In the trial of Murdiſon and Millar for ſheep-ſtealing, it was in like manner objected to James Hyſlop and others, herds to the farmers whoſe ſheep had been ſtolen, that they were incompetent or at leaſt ſuſpected witneſſes, as being anſwerable to their maſters for the value of the miſſing ſheep, if the loſs were owing to their own negligence or miſconduct. This objection alſo was repelled.

As already hinted, another circumſtance which may ſerve, in ſome meaſure at leaſt, to obviate the objection of intereſt, is, if ſuch intereſt ariſe from the act of the pannel himſelf; as happens where he raiſes a libel of recrimination, and calls therein as defenders ſome of the witneſſes contained in the proſecutor's liſt. Mackenzie has ſaid, that in ſuch a caſe, the proceſs of recrimination ought to be tried in the firſt place; and that the witneſſes cannot be received till they have had their acquittal of this charge. He adds, however, that he had known the Court allow ſuch witneſſes *cum nota:* and ſo they have done in one caſe at leaſt in later times; the caſe of the
Feb. 25. 1712. mutual libels beteen Macpherſon and Laidlaw, where Andrew Macpherſon and Donald More, being called in the counter libel at inſtance of Laidlaw and others, were admitted againſt thoſe perſons *cum nota* only. But we ſhall perhaps be nearer the

the truth if we ſay, that it is in the diſcretion of the Court to give the precedence to either proceſs, or join the two, or admit the witneſſes *cum nota*, according to the circumſtances of the caſe; which will commonly yield evidence of the nature of the proceſs of reconvention, whether it be a true and ſerious one, or, which happens as frequently, a contrivance only to meet and defeat the other. In the caſe of the Maſter of Tarbat and others, in Auguſt 1691, where a difficulty of this ſort had occured, the Court thought it beſt that the *Sieur de la Maſſie*, the perſon objected to, ſhould be firſt tried, alone. But he was afterwards ſet aſide entirely, by means of objections of a more peremptory nature.

Objections to witneſſes. *Socius criminis.*

UNDER the head of intereſt in the iſſue of the trial, we are naturally led to inquire concerning the ſituation of a *ſocius criminis*, and how far he is a receivable witneſs againſt his aſſociates who are under trial. The objection to ſuch a one, as it has generally been argued, reſts on two ſeveral grounds: that of the infamy of the witneſs, according to the ſtory which he is to tell of himſelf; and that of his intereſt to load and convict his aſſociate, in order the more to lighten his own ſhare in the foul deed, and the better to recommend himſelf to the favour of the proſecutor, at whoſe mercy he in ſome meaſure is. With the Judges of former times, according to Mackenzie, theſe conſiderations had been of ſufficient weight, to determine them againſt receiving a *ſocius criminis*, except in the trial of ſuch crimes as could not otherwiſe be proved at all. And in ſupport of what Mackenzie has ſaid, it may be alleged, that in the debate on this head in the trial of Macleod of Aſſint for treaſon, the proſecutor ſeems to allow, that ſuch may be the law with reſpect to thoſe at leaſt, who having themſelves been charged with the crime

Part 2. tit. 26. No. 10.

Feb. 2. 1674.

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Mar. 9. 1671.

crime in queſtion, have emitted declarations accuſing others. Reference may be made alſo to the trial of the Robertſons, for caſting down of houſes; where, after an argument at ſome length, between Sir John Niſbet and Sir George Mackenzie, judgment was given ſuſtaining this objection[1]: Whereupon, two witneſſes having been interrogated *in limine* touching their own participation of the crime, and having acknowledged that they were preſent and aſſiſting on the occaſion, their examination was here cut ſhort, and the aſſize ſtraightway found a verdict for the pannels. But the crime, in this inſtance, was one of a very public nature, the riotous demoliſhing of a houſe, with reſpect to which there could be no penury of unſuſpected witneſſes: And there was reaſon alſo to believe, that the pannels, two of whom were boys under fourteen years of age, and acting under the influence of their father, were more excuſable than the very perſons, their aſſociates, who were now called as witneſſes againſt them. That judgment, therefore, was in nowiſe deciſive of the law; nor indeed am I ſatisfied by any thing which has fallen under my own obſervation, that any ſuch rule ever gained ſo firm a footing in our practice, as Mackenzie has alleged. Certain it is, that ſoon after Mackenzie's own time, a deliberate judgment

July 3. and 4. 1693.

was given the other way. This was in the trial of Samuel Smith, for breaking into the houſe of Pennycuick: A precedent which is the more remarkable on this account, that Faa and Wilſon, the two *ſocii*, were not free from other reaſons of ſuſpicion; and that Smith was convicted and ſuffered death on the teſtimony of theſe two perſons alone, whoſe depoſitions form the entire proof in the caſe.

But

[1] "The Juſtices finds the objectiones proponed for the pannells againſt the "witneſs relevant."

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Objections to witneſſes. *Socius criminis.*

But on this head I ſhall not enlarge, becauſe, whatever ſcruples may once have been entertained, theſe have been reſolved in the opinion and practice of later times. It is now argued, reſpecting him who is challenged as *ſocius criminis*, that though not ſo creditable a witneſs as one who is liable to no ſuch imputation, yet ſtill he cannot be more infamous *in jure* with relation to this, than to any other trial; and that in all other trials he is a lawful witneſs, not having had any mark of infamy impreſſed on him by the ſentence of a court of law. And as to any bias which may ariſe from fear of the proſecutor; this too is obviated, if it be held, which is now the eſtabliſhed opinion, and was poſitively delivered on the Bench [1] in the noted trial of Smith and Brodie, that by the very act of calling him as a witneſs, the proſecutor diſcharges all title to challenge him for the future, with relation to the crime in hand [2]; which being explained to the witneſs before he depones, he is in a ſtate of abſolute freedom as to the ſtory he ſhall tell. For theſe reaſons, in the courſe of this century, and eſpecially in the later part of it, the objection of *ſocius criminis* has been frequently overruled; ſo frequently indeed, that it is now only moved in order to obtain, if the circumſtances

[1] In Auguſt 1788: ſee in the printed trial the opinions of the Judges on the objections to Andrew Ainſlie and John Brown.

[2] By ſtat. 21ſt George II. c. 34. No. 21., it was declared, that in all trials in Scotland for theft of cattle, it ſhould not be a good objection to any of the proſecutor's witneſſes, that he was *ſocius criminis*, and that ſuch witneſs ſhould not be liable to proſecution on account of his acceſſion to ſuch offence.

I know not whether the conſtruction which is now applied in all caſes to the act of the proſecutor, calling ſuch witneſs, was ſuggeſted at firſt by this ſtatute, which obviated in that way the objection of *ſocius criminis*. See the debate in the caſe of Macdonald and Jamieſon, in Auguſt 1770.

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circumſtances make it reaſonable, a reſervation of the credibility of the witneſs, as liable to be affected, in ſome caſes, by the account which he may give of his own miſdeeds. I will mention a few inſtances in teſtimony of this rule of our later practice: The trial of Macdonald and Jamieſon for ſhopbreaking (Auguſt 13. 1770); of William Pickwith for robbery (Auguſt 14. 1771); of Brown and Wilſon for murder (Auguſt 11. 1773); of Calder and others for ſhopbreaking (April 6. 1780); of Charles Cocks for ſhopbreaking (April 7. 1780); of Daniel Daveron for robbery (Dec. 11. 1786); of Smith and Brodie for houſebreaking (Auguſt 27. 1788). In all theſe inſtances a *ſocius criminis* was received, and in moſt of them, without a reſervation even of his credibility. Moreover, in ſome of the late trials for ſedition, though a crime in nowiſe of an occult nature, at leaſt in thoſe particular inſtances (for the miſchief ſtalked abroad for a while in open day) the evidence of Aitchieſon and other aſſociates in the conſpiracy was taken without reſerve. Obſerve too, that in Brodie's caſe, as alſo Calder's caſe, and Macdonald's, the perſon objected to had been formally charged with, and lay committed at the time for the fact libelled, and was brought from gaol into the Court-room, to depone.

Mar. and Aug. 1793. Jan. and Mar. 1794.

Objections to witneſſes. Indigence. Part 2. tit. 26. No 3.

VI. I HAVE now commented on all thoſe diſqualifications, which relate properly to the perſon or ſituation of the witneſs himſelf. It is true, Mackenzie hath affirmed in addition, "that witneſſes are not admitted with us if they be not worth "the King's unlaw, which we interpret to be ten pounds." But, though there are traces of ſome ſuch doctrine in the Books of Adjournal; yet I doubt if even in the laſt century there was any ſettled rule of diſqualification on ſuch grounds. For I obſerve that Robert Blair was received in the trial of Love

May 4. 1687.

and

and others, though it was proved that he aſked alms in winter, and earned his bread as a herd in ſummer. But, whatever might be the caſe formerly, we do not now proceed on any ſuch harſh and unjuſt preſumption, but freely take the evidence of perſons in the loweſt and moſt indigent conditions of life[1], if they have not diſhonoured their poverty with crimes. In the trial, for inſtance, of Anderſon and Marſhall, for robbery, James Chalmers and Daniel Cameron were received without objection, the one deſcribed as a blue-gown, and the other as a beggar. Dec. 2. 1728.

Objections to witneſſes. Irregular citation.

I WILL next briefly ſubmit a few remarks touching thoſe objections which are extrinſic to the perſon of the witneſs, and have relation only to the regularity of the proceeding by which the proſecutor ſummons him to appear. For if the citation be informal, as if it take place without the proper and ſufficient warrant, or when the officer has not his warrant upon him, or in England where the man is no officer, or the like; not only is the witneſs excuſed of his unlaw though he fail to attend, but the pannel alſo is entitled to take advantage of the blunder, and hinder him, though preſent, from being received. In the caſe of Alexander Durham, on finding that the witneſſes had all been cited on a notorial copy only of the letters, and not on the principal letters themſelves, or an extract of them, the proſecutor conſidering this blunder as fatal to the citation, moved to have the diet deſerted *pro loco et tempore;* which was done accordingly. Mar. 15. 1792.

[1] In the trial of John Pringle for theft, (June 20. 1715), the common executioner was received as a witneſs. He is deſigned, "Harrie Ormiſton, *lockman* to "the good town of Edinburgh."

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accordingly. There are not, however, any fixed *inducia* for the citation of witneſſes, as of the pannel himſelf; ſo that if they appear, and the proſecutor ſhow a regular execution againſt them, the citation ſhall be good, though it be given on the very morning of the day of trial.

Objections to witneſſes. *Miſnomer.*

It is one circumſtance among others, which muſt be carefully obſerved as to every witneſs, that he be rightly named and deſigned in the principal liſt of witneſſes, and in the copy of it alſo which is delivered to the pannel. For though the principal liſt be right, it is a good objection that the pannel's copy materially varies from it; as on the other hand, it is alſo a good objection that the principal liſt is wrong, though the pannel's copy be agreeable to the truth; becauſe the principal liſt is the warrant of citation, and the copy muſt agree with the principal. It is to be obſerved too, reſpecting any inaccuracy in the pannel's copy of the liſt, that it cannot be cured by the after-ſervice, though clear of the fifteen days *inducia*, of another and a more correct copy. The reaſon is, that the regulations of 1672, and the Act of Adjournal of 26th July 1675, have directed, that the pannel be ſerved with his copy of the liſt of witneſſes, and of the libel, at one and the ſame time; the whole making but one execution. There is no remedy, therefore, in this ſituation, but by ſerving the pannel anew, if there be ſufficient time for it, with a copy of the libel as well as of the liſts[1]; as was done (but this charge

[1] Lord Royſton, in his Notes, *ad p.* 271. ſays, that judgment was given to this effect, in the caſe of the Stirlingſhire gentlemen, (22d Nov. 1708); and in that of the Macgregors, 3d Aug. 1736. But I find nothing of this in the record; as indeed the practice has not been uniform, of inſerting there proceedings of this ſort.

charge was deſerted in the end) with a view to the trial of James Dundas. Jan. 21. and Mar. 3. 1712.

Objections to witneſſes. *Miſnomer.*

RESPECTING the degree of inaccuracy in the name or deſignation of a witneſs which will ſerve to ſet him aſide, nearly the ſame rule will ſuit, as reſpecting an error in the name of the pannel himſelf. A critical and punctilious accuracy is not indiſpenſable; but the citation is void if there be any material variation, ſuch as may poſſibly miſlead or deceive the pannel, in his inquiries concerning the individual who is ſummoned. In the trial of James Gray, it was held a good objection that a witneſs was named Thomas *Farm* in the liſt, who ſubſcribed his name *Fairholme* [1], which we often pronounce *Farm* in common diſcourſe. In the trial of Dick and others, Alexander Menzies was ſet aſide, being deſigned tailor in *Dundee* [2]; where he did not reſide at the time of citation. In the ſame trial, the like objections were ſent to proof, with reſpect to Alexander Macdonald and Ann Vallentine, both deſcribed as dwelling in Dundee; but the proof was not ſufficient, and they were therefore received. In the trial of Smith and Brodie, *Mary Hibbut* was challenged,

See vol. i. p. 253.

July 11. 1737.

Nov. 24. 1788.

Aug. 27. 1788.

[1] This does not appear in the record, and I mention it on the authority of a MS. Abridgment of the record, the property of Lord Glenlee, of which I have had the uſe and peruſal. It is alſo ſet down in an Abridgment of the records, which is in my own poſſeſſion.

In the ſame Abridgment, it is mentioned, that Thomas Millar was rejected as a witneſs in this trial, not being above twelve years of age.

[2] "Alexander Menzies, journeyman tailor in Dundee, examined *in initialibus*, and diſmiſſed, as not properly deſigned, he not being now a journeyman tailor in Dundee."

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challenged, becauſe her name was written *Mary Hubbart* in the liſt: One of the Judges gave his opinion for ſuſtaining this objection, and the proſecutor then conſented to diſmiſs her. In the liſt for the trial of Tenant and Molyſon, Iſobel Lees was deſcribed as ſervant to Alexander Clark [1]; and it was ſuſtained to ſet her aſide, that ſhe was not ſervant to Alexander Clark at the time of ſerving the indictment. In Wilſon's caſe, in January 1790, William Heard, deſigned tenant in Ulſton, was in the liſt of witneſſes; and it was held relevant to exclude him, that it was not he who was tenant there, but his brother, to whom he was overſeer or ſervant: But the pannel failed to prove his allegation. In the caſe of William Smith, a witneſs was rejected on account of a variation of one letter only; and this with good reaſon, her name being written Iſobel *Law* in the liſt, inſtead of Iſobel *Low* [2]. The like variation was equally fatal in the above-mentioned caſe of Wilſon, where William Wilſon was ſet aſide, being deſcribed as reſiding in *An*derſtonelee, inſtead of *Ad*derſtonelee, the true name of his dwelling-place. Even if the name be right, ſtill it may afford a ground of exception, if the witneſs either is not deſigned at

Dec. 28. 1789.

Aug. 29. 1791.

[1] "Iſobel Lees, ſervant to the ſaid Alexander Clark, diſmiſſed as wrong deſigned, being at the time of ſerving the indictment, not the ſervant of Alexander Clark." To prevent objections of this ſort with reſpect to ſervants, who are changing their ſervice from time to time, it is uſual to deſcribe thus, "ſervant, or late ſervant," to ſuch a perſon, which is ſufficient.

[1] This is not in the record; the woman's evidence having been abandoned, on the ſtating of the objection. I mention it on the authority of a note of my own, having been preſent at the trial.

at all [1], or not in ſuch a way as to diſtinguiſh the individual.

I WILL lay before the ſtudent ſome inſtances alſo of judgments on the other ſide; though as to ſome of them, I think there is room for difference of opinion. In the trial of Janet Riddell for childmurder, *Marion* Paterſon was received, though named *Margaret* Paterſon in the pannel's copy of the liſt. In the trial of William Smith already mentioned, it was objected to William Stoddart, deſigned "collier at Stobhill in "the pariſh of Borthwick," that there was no ſuch place in that pariſh, though there was in the pariſh of Newbattle adjoining: This objection was repelled. In the trial of Owens and Collins at Glaſgow for murder, it was objected to Iſobel Maccallum, wife of John Maccallum, that her maiden name was Fraſer, and that ſhe ought to have been deſcribed accordingly. But the anſwer was juſtly held to be good, that the individual was clearly diſtinguiſhed, and that in practice this was an ordinary way of naming a married woman.

Objections to witneſſes. Miſnomer.

Dec. 29. 1701.

Aug. 29. 1791.

Sept. 20. 1792.

IF a witneſs, being duly cited, ſhall fail to attend or offer a ſufficient excuſe, he incurs a fine, or *unlaw*, as it is called, of 100 merks; and this whether he be cited perſonally, or at his dwelling-place only [2]. If he dare not appear, for fear

Witneſſes, how compelled to appear.

[1] From a minute of debate in the caſe of David Strang, (19th Feb. 1736), it appears that in the caſe of Smith of Farthingruſh, (in March 1732), a witneſs was ſet aſide, as being only deſigned *drover*, without addition of his place of reſidence. But the record takes no notice of any ſuch matter.

[2] It appears that this had once been queſtioned. Lord Royſton has this note at p. 271. "Beſides they will be unlawed, even though cited only at "their

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fear of perſonal execution for payment of debt, the Court, on the proſecutor's application, ſupported with his oath that the witneſs is material in the caſe, will grant him a protection for the neceſſary ſpace of time, not exceeding a month. If a witneſs mean to abſcond, for the diſappointment of juſtice, warrant may be given on the like oath and application (which is at the proſecutor's peril if made improperly) to apprehend and impriſon the witneſs till ſuch time as he find caution for his appearance. This was done on the 12th July 1751, with a view to the trial of Thomas Gray; and alſo, on the 26th February 1737, on the petition of the Solicitor-General, previouſly to the trial of William Maclachlane, and others of the Porteous mob. If the witneſs be ſuch a perſon as cannot find caution, he may even be committed abſolutely and without relief; as was done with reſpect to John Ker and Helen Yorſtoun, two gypſies, who were meant to be called as witneſſes in the trial of certain of their own tribe. "They in reſpect that the above-named John "Ker and Helen Yorſtoun are not able to find caution to the "effect above mentioned, therefore ordain the ſaid John Ker "and Helen Yorſtoun to be carried back to the tolbooth of "the Canongate, there to remain until the event of the trial "above mentioned, the petitioner paying the ſaid perſons "their expences, during the time of their impriſonment." The like courſe muſt be taken in ſome other ſituations, where the expedient of ſurety cannot ſo well be relied on; as if there be reaſon to fear that the witneſs will not ſcruple to forfeit his ſurety, or that he may be carried off, or invaded

Stat. 1681, c. 9.

July 20. 1714.

"their dwelling-houſe, and not perſonally, as, 22d Nov. 1697, in Kinninmount's "caſe; and 15th Jan. 1728, Porterfield againſt Buntine. In both which caſes "the objection was proponed and repelled."

ded, and diſabled to appear, or tampered with, and overawed or corrupted: In ſuch preſſing caſes, he may be committed to ſome place of ſafe cuſtody, (ſometimes the Caſtle of Edinburgh has been choſen), there to remain, on an aliment to be aſſigned him by the Court, and furniſhed by the proſecutor, if he be indigent and unable to maintain himſelf. On the 23d July 1711, James and George Macminn, two perſons who had been impriſoned for ſecurity of their attendance, (having been cited as witneſſes againſt their own father on his trial for murder), had an aliment aſſigned them, to be paid by his Majeſty's ſolicitors. The like order was given on the petition of John Dennizau, a foreigner, who was unable to find caution. Anne Clark and two other women, were committed to the Caſtle of Edinburgh, previouſly to the trial of Nairne and Ogilvy, leſt they might be removed or tampered with on the part of the pannels. Alſo, on the 13th Auguſt 1788, and with a view to the trial of Smith and Brodie, Mary Hubbart, the wife of Smith, and Grahame Campbell, were impriſoned *till farther orders*, on the Lord Advocate's petition, ſetting forth his belief of their intention to abſcond. "It is now or- "dinary, (ſays Lord Royſton), *cauſâ cognitâ*, to grant a war- "rant for impriſoning witneſſes till they find caution, and "may even refuſe bail if there is juſt reaſon to apprehend "they will rather forfeit their bail-bond than compear." On the other hand, and certainly with equal reaſon, the like aid has been given the pannel, to ſecure the evidence of the witneſſes on his part. As upon the petition of John Grahame, a perſon indicted of murder, who ſet forth that William Steil and Gilbert Welſh, two material witneſſes, were ſoldiers in a regiment lately broken, and were about to depart for Ireland; whereupon he had warrant to impriſon them, till they ſhould find caution to appear.

Jan. 14. 1749.

See 6th Auguſt 1765.

Ad p 271.

Aug. 25. 1712.

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Objections to witneſſes. When to be ſtated.

As the witneſſes are ſucceſſively called into Court to be examined, they are preſented to the pannel, and he is deſired to ſay with reſpect to each of them, whether he have any objection to him as a witneſs. If, therefore, he neglect this which is the proper ſeaſon for ſtating any challenge he may have to any of them, whether touching the man himſelf or the proceſs of his citation; it is certain that he loſes the benefit thereof, and cannot afterwards invalidate the trial, under pretence of diſcoveries which he has ſince made in that reſpect, ſuch as that the witneſs is infamous, or that his name was not in the copy of the liſt, or the like. For to what end is the pannel ſerved with the liſt of witneſſes ſo many days before his trial, but that he may learn and be able to prove all the competent exceptions of this ſort which may lie againſt them, or any of them? How far the ſame ſhall be law with reſpect to thoſe irregularities which are not properly the peculiar concern of the pannel, but rather fundamental vices in the proceſs, and impoſitions on all concerned, is a queſtion of more difficulty, and which muſt be handled with greater caution. If ſuch a thing could happen, as that ſome one perſonates a witneſs, and is examined inſtead of him; it may at leaſt be maintained with plauſible arguments, that, equally as the like miſtake in the caſe of a juryman, this is an abſolute nullity of the whole trial, and one which there is no room to get rid of, on the notion of any implied conſent on the part of the pannel.

Swearing of the witneſſes.

If no objection is offered to the witneſs, he is ſworn by one of the Judges; and this he muſt ſubmit to or be rejected, although he be one of the people called Quakers. For ſuch is the expreſs, and certainly proper, limitation of the ſtatute 22d Geo. II. c. 46. No. 37., which gives thoſe of that perſuaſion the privilege

vilege of being credited in moſt matters on their affirmation inſtead of oath[1], that they cannot ſerve as jurymen or witneſſes on criminal trials, unleſs they be ſworn in the ordinary way. In the trial of James Stewart, the Quaker witneſſes, refuſing to take the oath, were therefore ſet aſide; January 22. 1799.

Purging of enmity, receipt of reward, &c.

AFTER being ſworn, the witneſs has next to *purge* himſelf (as it is called) of malice and ill will to the pannel, of all receipt or promiſe of good deed or reward for his evidence, and of all inſtruction how to depone. Of the firſt of theſe articles, ſomething has already been ſaid. As to the ſecond; if the proſecutor, or any for him, have tempted the witneſs with the offer of any bribe or reward, this ſhall equally exclude his teſtimony, *in odium corrumpentis*, whether the witneſs have yielded to or reſiſted the ſolicitation. Under this head would fall any promiſe which may have been made him of a pardon of his other crimes, in caſe he ſhall be materially inſtrumental in convicting the accuſed; provided always ſuch promiſe have come from the proſecutor, or ſome one commiſſioned on his part. Any magiſtrate who ſo far miſtakes his powers, and forgets his character, as to give aſſurances of this ſort, is indeed guilty of a wrong which may reflect on himſelf; but he cannot take away the intereſt even of the private complainer, and much leſs of the Lord Advocate

[1] Lord Royſton mentions in his Notes, that in the caſe of the Glaſgow rioters, in September and October 1725, a Quaker was admitted a witneſs upon his affirmation, by miſtake. He alſo mentions, in another paſſage, that in the trial of Captain Porteous, one Chriſtie, a Quaker, was refuſed to be received a witneſs for the pannel; *ad p.* 265.; *& p.* 250. By miſtake, a Quaker was admitted on his affirmation, in the trial of Mealmaker in 1797.

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for the public. So it was held in the caſe of Brodie, where an allegation of this ſort was made with reſpect to Andrew Ainſlie.

Inſtruction how to depone.

As to the third article; it is not only the expreſs and corrupt tutoring of a witneſs in a particular ſtory that is exceptionable, but every practice or contrivance which may tend indirectly to conſtrain or give him a bias in telling his ſtory; ſuch as to write him letters on the ſubject of his teſtimony; to furniſh him with narratives of the fact; to ſend him notes or obſervations on the caſe; to take private and written accounts from him of what he can ſay, and the like; all which practices are more exceptionable ſtill, if they are uſed after his citation [1] as a witneſs. And though it may be true, that irregularities of this ſort may not in every inſtance have the effect of ſetting aſide the witneſs, who may happen to be a perſon *optimæ opinionis*, and above all ſuſpicion; yet are they always dangerous and prejudicial proceedings for which the party ſhall be liable to cenſure, and which the Court will recommend to the conſcience and conſideration of the jury. It appears from the petition of John Maccaul, pannel, recorded

[1] In the trial of Spreul for treaſon, June 13. 1681, it was ſtrenuouſly objected by Sir George Lockhart for the pannel, that David Caldwall could not be admitted a witneſs, having, ſince his citation, been examined on oath reſpecting the contents of the libel. The Court repelled the objection, "in reſpect they do "not allowe his Majeſtie's Advocate to adduce theſe depoſitions againſt the pan-"nel as ane probation." But the deciſions of this period in trial for ſtate crimes are no authority.

In the caſe of Spalding, in February 1673, Alexander Stewart was ſet aſide on account of threats uſed to him, and directions given him how to depone by another witneſs. This ſeems to be an exceptionable judgment, unleſs it had appeared that the latter acted at the deſire, or by the commiſſion, of the proſecutor.

corded April 13. 1714, that the witneſſes againſt him had all been ſet aſide on account of the proſecutor's unjuſtifiable conduct, " in taking their declarations ſigned, upon oath, in a ta-" vern, where he had them met together for that purpoſe, and " keeping the ſaid ſworn declarations in his or his doer's " cuſtody, to overawe the witneſſes."

Witneſſes are examined ſeparately.

Our cuſtom is not content with reprobating all inſtructions given a witneſs how he himſelf ſhall depone, but deprives him even, as far as poſſible, of all opportunity of learning what the other witneſſes have ſworn, and aims at obliging him to give his evidence according to his own underſtanding of matters, and to as much only of the fact as he knows of his own proper knowledge. And herein our purpoſe is, not only to obviate the riſk of any combination among the witneſſes to wrong the pannel, by concerting a ſtory with each other, but to prevent even that impreſſion which the account given by one witneſs may naturally make on the mind of another. With this view, before proceeding to take the proof, all the witneſſes on either part are ſhut up in an apartment by themſelves, whence they are ſucceſſively and ſeparately called into Court, to be examined; ſo that it is a good objection to any one, if he has been left at large, and has heard the teſtimony or part of the teſtimony of another, by which he may ſhape his own. This is our rule, not only as to the ſeveral witneſſes conſidered in relation to their fellows on the ſame ſide, but to thoſe on the other ſide alſo; ſince thoſe for the pannel, having learned the ſtate of the evidence againſt him, with its weak and ſtrong parts, might otherwiſe be inſtructed how beſt to oppoſe and countermine it.

Nay,

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Witneſſes precognoſced ſeparately.

NAY, which is a great deal ſtronger, and liable indeed to objections of no little weight, more eſpecially as it is of late years only that this degree of ſtrictneſs has been introduced, witneſſes have in more than one inſtance been ſet aſide, becauſe they had been precognoſced even in preſence of each other. In the trial of John Lindſay, thirteen exculpatory witneſſes were rejected, (for if the doctrine is good, it applies equally on either ſide), becauſe they had aſſembled at the deſire of the agent for the pannel, and had their declarations taken down [1], and read over in preſence of the whole of them. But I muſt obſerve, that here there was ſomething more than mere accidental preſence: It was the unauthoriſed and deliberate act of a party, calculated to bias and prepare his witneſſes. In the trial, however, of Brown and Murray, for deforcement, the objection was ſuſtained to John Macfarlane, that he had been preſent at the taking of the precognition; which being the ſituation alſo of all the other witneſſes, the proſecutor declined to call them, and, in conſequence, the pannels were acquitted. This rule, ſuppoſing it to be fixed in ſuch a manner as not to be altered, muſt, however, be received in a reaſonable ſenſe, and ſuch as is conſiſtent with the neceſſary courſe of buſineſs in taking precognitions. It does not therefore apply to the magiſtrate, who is officially preſent in taking the ſeveral examinations; and ſo it was ſettled in the trial of John Ker for fire-raiſing, where ſuch an objection was ſtated to Thomas Chriſtie and James Hog, the bailies of Dunbar. Thoſe witneſſes too, who are called only to authenticate the pannel's declaration, which is quite a ſeparate proceeding, and poſterior to the

Jan. 31. 1791.

July 13. 1791.

Jan. 13. 1792.

1 "Suſtain the objection to ſuch witneſſes as were preſent at the examination "condeſcended on in the objection, and find that they cannot be admitted to "give evidence in this trial."

the main fact related in the libel, ſeem not to be within the rule of this prohibition. To ſay the truth, there ſeems to be ſome reaſon for reconſidering this whole matter, before it is too late. Becauſe it is a thing which naturally, and without any purpoſe of doing wrong, muſt ſo often happen, that in the firſt and moſt material ſteps of a precognition, ſuch as the production of ſtolen goods, the identifying of a robber, or the like, the perſons who have recovered the goods, or ſeized the robber, or ſo forth, go before the neareſt magiſtrate at one time, and there tell their ſtory to him together. And in this there ſeems to be nothing more dangerous, than in the circumſtance of the witneſſes converſing with each other on the ſubject of the future trial, a thing which always happens, and cannot be prevented. Beſides, in hearing each other's declarations, they are not maſters of each other's teſtimonies on oath in the trial, which, as all who are verſant in that ſort of buſineſs know, are often materially different from the other. Moreover, it ſeems to be unfit that it ſhould be in the power of every ignorant Juſtice of the Peace, nay even of a deſigning witneſs, or a crafty agent, thus to ſacrifice the public intereſt, and hinder the courſe of juſtice. At all events, even with reſpect to the evidence upon oath, the Judge will not ſuffer the ſcrupulouſneſs of our practice to be made a handle of, for the indulgence of ſpleen or ill humour on either part. In the trial of Fullarton, for aſſault and battery, a motion having been made to have all the witneſſes removed, it was requeſted for the proſecutor, that John Spence, his agent, ſhould be allowed to remain, whom the pannel had cited, purely to deprive the proſecutor of his aſſiſtance; Spence not having been preſent on the occaſion, and knowing nothing of the matter, but by information from others. Which, upon inquiry, appearing

Aug. 12. 1768.

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pearing to be true [1], an exception was made in his behalf.

Witneſs may have his declaration cancelled.

AFTER being queſtioned *in initialibus*, and before giving his evidence on the caſe, the witneſs, if he pleaſe, may call for his declaration, or depoſition if he has been examined on oath, and have it cancelled in his preſence, that he may be at abſolute freedom in telling his ſtory on the trial [2]. This

May 4. 1687. was done in the trial of Love and others for treaſon, where the Privy Council had examined ſeveral witneſſes upon oath. But even if the declaration ſhould not be cancelled, yet certainly it can never be employed in any manner of way to the prejudice of the witneſs [3]; nor can it even be produced in the trial, to diſcredit his evidence, by ſhowing that on a former occaſion he had given a different account of the fact. Still leſs in the ordinary caſe, will verbal teſtimony to that effect be received, to impeach the credit of his oath. The only proceeding of this character which I have

July 16. 1750. met with, is in the trial of David Malloch, an exciſeman, for killing a ſmuggler, in the courſe of the duty of his office. One Stevenſon, alſo a ſmuggler, had given a teſtimony highly

[1] "Having conſidered the foregoing motion, with the anſwer made thereto, "find there is no neceſſity for removing John Spence, and allow him to remain "in Court; but ordain all the other witneſſes to be removed."

[2] "The Lords ordainis his Majeſtie's Advocat, or my Lord Glaſsford, donater to the pannell's forfaulture and eſcheat, to produce the depoſitions already "taken, that they may be cancelled before the witneſſes depone."

3 It was once attempted to found a charge of perjury againſt a witneſs upon his oath in the trial, compared with his declaration; but this proſecution was abandoned after an order for lodging informations on the relevancy of the charge. The caſe of Patrick Maccurley, Auguſt 4.; November 27. 1777. See Commentaries on Deſcription, &c. of Crimes, vol. ii. p. 134.

ly unfavourable to Malloch, in which he differed from all the other witneſſes in the trial. To invalidate this, Macarthur, an exculpatory witneſs, had been allowed to relate a very different ſtory which Stevenſon had told in his hearing, on a former occaſion, immediately after the ſlaughter. Now, to ſupport Macarthur's evidence, and in farther impeachment of Stevenſon's veracity, the pannel propoſed to examine one Anderſon, who had been preſent at Stevenſon's converſation on this ſubject, along with Macarthur. The Lord Advocate objected. The pannel rejoined, that Stevenſon was the only perſon preſent at the ſlaughter; was himſelf a known ſmuggler; was aſſociated with the deceaſed in the act of ſmuggling at the very time when he was killed; and was more likely to tell the truth recently on that diſaſter, than now, at a diſtance of time, when he might probably be actuated by motives of a different kind. In reſpect of theſe circumſtances, the Lord Advocate deſiſted from his oppoſition; but with the due precaution to hinder this conceſſion from ſerving as a precedent in time to come. "His Ma-"jeſty's Advocate and procurator for the purſuer conſent-"ed to the receiving the witneſs, but under proteſtation "that it ſhould never be made uſe of as a precedent in this "Court."

Evidence not now reduced to writing.

I HAVE ſtill to take notice of one circumſtance more, reſpecting the form of that ſort of proof which is the ſubject of this Chapter. As far as appears from the oldeſt Books of Adjournal, our firſt practice had been to receive the depoſitions *vivâ voce*, without entering in the record ſo much as

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the names even of the perſons examined. In the trial of John
Feb. 14. 1615. Maxwell for murder, the depoſitions are for the firſt time ſet down at large, though without being ſigned by either Judge or witneſs. After that time, the depoſitions are occaſionally taken notice of, but often in a very imperfect form, and ſuch as more reſembles a brief note of the reſult or general ſubſtance of the teſtimony, than a narrative taken from the mouth of the witneſs. As, for inſtance, in the trial of James
Mar. 19. 1634. Clark, for cozenage and other offences, the record bears this and no more with reſpect to the two principal witneſſes, that they ſwore to the verity of the dittay [1]. But even this ſort of ſummary of the evidence, was more frequently omitted than given; nor does the practice of inſerting the depoſitions at large ſeem to have been eſtabliſhed till 1661, or thereby. From that time, though attended with much trouble and loſs of time, it continued to be uniformly obſerved till the 21ſt of George II.; when, by ſpecial ſtatute, c. 19., of that year, a diſpenſation was given in this reſpect, as far as related to the trial of crimes not inferring death or demembration, under proviſion that one of the Judges ſhould ſum up the evidence to the jury, before incloſing. The like allowance, and qualified with the like proviſion, is, by ſtatute 23d Geo. III., c. 45., extended to the trial of all crimes; under reſervation, as in the former ſtatute, of

[1] "Robert Moubray and Robert Doig, ſworne anent the ſword, depones "*conformis*, that the article of the dittay red to theme y^anent, is trew in "y^eſelff."

of power to the Court ſtill to proceed in the old form, in any caſe where they ſhall judge it adviſable [1].

[1] The expences of witneſſes in criminal trials are paid at a proper rate, by the parties at whoſe inſtance they are cited; and in caſe of refuſal or delay, horning iſſues againſt thoſe parties, to compel them. On the 28th November 1699, on the petition of Patrick Sinclair, and others, witneſſes in a proſecution at inſtance of Sutherland and Henryſon, the Lords ordained thoſe perſons to make payment to the witneſſes within three days; and in caſe of failure, granted warrant for letters of horning, to compel them. See alſo petition of John Imbrie, and others, Jan. 17. 1709. Formerly, even the lawyers for the Crown were not privileged againſt the uſe of this ſort of diligence, in caſes of proſecution at their inſtance. Thus, on the 26th June 1704, the Lords granted warrant for horning, at inſtance of the witneſſes, in the trial of Marion Govan, for their wages, againſt her Majeſty's Solicitors, William Carmichael and Sir David Dalrymple. Nay, ſometimes they were decerned to pay, though only concurring with a private party: For, on the 26th and 27th June 1710, I find the Queen's Solicitors obtaining horning againſt John, Adam, and James Dunn, informers, for relief of what they had paid to the witneſſes. I learn from the anſwers for Sir James Stewart, her Majeſty's Solicitor, to the petition of the Crown's witneſſes, in the trial of Gideon Guthrie, (22d July 1715), that down to the Union at leaſt, a certain annual ſum was impreſſed in the hands of the Solicitor-General, to anſwer charges of this ſort. Theſe anſwers are printed, but are not in the record.

Sometimes too, when witneſſes came from a diſtance, and the proceſs ſuffered delay, the Lords ordained the party citing them, to advance them ſubſiſtence at a certain rate *per* day, in the mean time. Order was given for payment of a ſum, July 27. 1714, on the petition of David Taylor, and others, from Caithneſs.

CHAPTER XIV.

OF PROOF BY EXHIBITION OF WRITINGS OR OTHER ARTICLES.

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IT now only remains to take notice of one other ſort of evidence on the proſecutor's part, that which conſiſts in the exhibition of articles in the hands of the clerk of Court; ſuch as the pannel's declarations, the forged writings, the ſtolen goods and falſe keys, the bloody clothes and inſtruments of murder, or the like. Any of which may either be articles of evidence, of themſelves, or may become ſuch through what is ſworn to concerning them by the witneſſes in the trial; as if a bloody knife be found lying by the body of the deceaſed, and is ſworn to by John and James who found it there, and who know it to be the pannel's knife.

Notice of production of articles.

UNDER this head, the circumſtance which chiefly requires to be commented on, is the ſort of notice that muſt be given the pannel concerning ſuch articles, and the uſe which is intended to be made of them on his trial. Before the inſtitution of the preſent Court of Juſticiary, our cuſtom does not ſeem to have impoſed on the proſecutor any ſort of duty in this matter; ſo that, for aught I have obſerved, a witneſs might

might have produced the ſtolen goods, or the bloody weapon at the table, and there have lodged them with the clerk, to remain and be the ſubject of teſtimony by other witneſſes, though the pannel had received no previous notice of ſuch a purpoſe. The ſtatutory regulations alſo of 1672, while they ordered the pannel to be ſerved with the liſt of witneſſes, were quite ſilent, and left the proſecutor equally at large as before, in regard to any farther diſcloſure of his intended evidence, or means of proof. Arguing, however, by analogy to what was preſcribed reſpecting witneſſes, and is obſerved alſo in the courſe of civil proceſs, our lawyers appear ſoon to have put in a claim for the pannel, to ſome indulgence in the communication of this ſort of evidence alſo. At firſt, they ſeem to have carried his pretenſions this length, that the articles meant to be uſed in evidence againſt him, writings, or whatſoever they were, muſt be given out to him, to be ſeen and conſidered, along with his copy of the libel and liſts. But, for very obvious and ſufficient reaſons, this plea was without heſitation repelled: Firſt in the caſe of the Mac- Dec. 18. 1676.
gibbons, where one article of the charge related to certain threatening letters; and afterwards, in the trial of Buchanan Mar. 11. 1687.
of Leny for perjury[1]. Soon after the beginning of the preſent century, it did, however, come to be the faſhion in thoſe caſes (for I have not obſerved the ſame in any other) where writings were to be produced, and were in a manner the foundation of the criminal proceſs, ſuch as caſes of forgery, perjury, or deforcement of officers of the law, that the writings were put into the hands of the clerk of Court, at the time of executing the libel; and that the libel took notice of them as

1 "The Lords having conſidered this debate, they repel the dilator defence "above written."

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Dec. 24. 1705. as lodged there, for the pannel's inſpection. Particularly, in the trial of William Paton and Sir Alexander Cuming for forgery [1], the Lords deſerted the diet, becauſe neither had the writings been lodged, nor copies of them been given out along with the libel, to be ſeen. And again, on the libel againſt

Nov. 1714. Sir Robert Dunbar, for oppreſſion as a Judge, in pronouncing certain vexatious decrees, the Court ſuſtained an objection [2], which, if I underſtand it, was to this effect, that the decrees in queſtion, after being lodged with the clerk at raiſing the libel, and after remaining there for two days, had been taken up

[1] "In regard that the principal notorial copy of the royal borrows act, and "other papers libelled on, were not put in the clerk's hands the *time of raiſing* "*the libel*, nor doubles thereof given to the pannels, with the double of the prin- "cipal libel; and that the ſaid notorial double, alleged to be atteſted by the pan- "nel, is not as yet in the field; therefore, the ſaid Lords have deſerted the diet "againſt, &c. *ſimpliciter*."

[2] "2*do*, By referring to the decreets and other writs, alleged by the libel to "be in the clerk's hands, the purſuer has circumſcribed himſelf to, and made his "election of that mean of probation; and if it ſhould be found, as it certainly "will, that theſe writs were not in the clerk's hands, from two days after the "executing of the letters, till Saturday before the trial, it muſt neceſſarily be "deemed, that the writs now produced are not (according to the deſignation gi- "ven in the libel) the writs in the clerk's hands; and therefore, that they can- "not be uſed as evidences in this trial." *Pannel's Information.*

"It is true, that of late complainers have, *ob majorem cautelam*, made their libels "refer to the writs, as in the clerk's hands, that ſo the party at his compearance "may have inſpection, and know to manage his defence, and ſo this libel does "accordingly narrate, and the writs were in the clerk's hands the laſt ſeſſion, and "only taken upon receipt, and would have been called back, if the pan- "nels had deſired a ſight of them from the clerk: but the pannels, perfectly "knowing the tenor of their own decreets, and other writs produced, which, in "effect were their own deed, did not aſk for any ſight of them till Saturday laſt, "when they were put in the clerk's hands upon his requiring of them." *Proſe- cutor's Information.*

up by the proſecutor, and were not returned to the clerk till the Saturday before the trial. Accordingly, for ſome years after this deciſion, the ſtyle of libel in caſes of this kind was right uniform, in referring to the writings as already lodged with the clerk, for the pannel's inſpection, if he choſe.

Notice of the intended production of articles.

But in laying down ſo abſolute a rule, the Court ſeem to have gone farther than was warrantable on any authority that could be alleged for ſuch a practice, which was matter of pure courteſy, and recent indulgence on the proſecutor's part; and farther too than the reaſon of the caſe required, ſince a far ſhorter time may ſerve for the peruſal of writings, or the inſpection of goods, or the like, than for inquiry into the character and ſituation of witneſſes and aſſizers. Theſe deciſions had not therefore the effect of fixing the law. The ſtyle of referring in the libel to ſuch articles of evidence as already lodged with the clerk of Court, paſſed away in a few years. And in the trial of James Hamilton, and others, for deforcement, where this point was argued at large, the trial went on, although neither were the writs of diligence lodged with the clerk at raiſing the libel, nor was any notice given there of the purpoſe to produce them. The libel was equally ſilent on that head, in ſundry trials of a later date for theft and robbery, in which the ſtolen goods were exhibited nevertheleſs, and were ſworn to by the owners.

Dec. 27. 1725. Jan. 3. 1726.

Notice of purpoſe to produce articles.

But practice has at length ſettled this matter in an equitable way, ſuch as leaves no room for complaint to either party, thus: That no article can be uſed in evidence againſt the pannel, with reſpect to which the libel has not warned him of the proſecutor's intention ſo to uſe it; but that it is ſufficient

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cient if the article be lodged with the clerk of Court, in due time before the trial; at ſuch a time, according to the circumſtances of the caſe, as allows the pannel ſufficiently to examine and inſpect it. The notice which the libel takes of the intended production, is expreſſed therefore in theſe or the like terms: "Which declarations (or which articles of ſto-"len goods, or as the caſe happens to be) being to be uſed "in evidence againſt you upon your trial, will, for that pur-"poſe, be lodged in due time with the clerk of the High "Court of Juſticiary, before which you are to be tried, that "you may have an opportunity of ſeeing the ſame."

What if the thing does not ſuit the deſcription.

If, beſide giving this notice, the libel particularly deſcribe the thing that is to be produced in evidence, and if this deſcription is found not to ſuit the thing which the clerk has in his hands; as, for inſtance, if the libel mention a declaration as ſigned by the pannel, and it is found to be ſigned only by the magiſtrate in his ſtead; it follows that this article cannot be made uſe of on the trial: for, in the eſtimation of law, it is not the ſame article of which the pannel has got notice. Thus, in the caſe of

Auguſt 1788. Smith and Brodie, the libel gave notice that a *bank-note* for L. 5 was to be uſed in evidence againſt them; but in this purpoſe the proſecutor was diſappointed, becauſe the note in the clerk's hands was held not to be properly a bank-note, being the note of a private banking houſe only, and not of any of the chartered and corporate banks. On the like principle, though not in the form of an interlocutor ſuſtaining an objection to evidence, judgment had been given long ago, and in times not ſo ſtudious of correctneſs in ſuch mat-

Mar. 11. and 14. 1687. ters: I allude to the trial of Buchannan of Leny, for perjury; where, after repelling another objection, of which no-

tice

tice has already been taken, the Court deſerted the diet, becauſe the dates of the depoſition and miſſive-letters in the hands of the clerk [1], were different from thoſe ſet forth in the libel.

Muſt the libel ſpecially deſcribe the things.

But how far is it neceſſary towards the production of any article in evidence againſt the pannel, that a minute and particular deſcription of it be given in the libel? In ſome caſes, ſuch as thoſe of forgery, perjury, or incendiary letter, certainly ſuch a deſcription muſt be given; becauſe here the writing to be uſed, the falſe inſtrument, or oath, or malicious epiſtle, is itſelf the *corpus delicti;* and the charge cannot be made without ſetting forth its chief circumſtances and characters, or even engroſſing the very words in the body of the indictment. With reſpect alſo to the pannel's declarations, it as readily happens that theſe too are deſcribed by their dates at leaſt, and the name of the magiſtrate before whom they are given; for without taking notice of theſe particulars it is not eaſy, at leaſt it is not natural, to give any account of ſuch examinations at all. But with reſpect to articles of ſtolen goods, the inſtruments of houſe-breaking, or aſſault, or murder, or the like, which are referred to in the depoſitions of the witneſſes, and only in this way become articles of evidence; I find no authority which obliges the proſecutor to mention or deſcribe them otherwiſe than in general terms, ſuch as fix the kind only or ſort of thing. As, in the whole of this matter, our practice

[1] "Having conſidered the libell, and that pairt of the debaite relateing to the "dates of the miſſive-letters, and the firſt depoſitione mentioned in the principall "indytement, finds them diſconforme to the dates of the letters, and of the de-"poſitione now produced; and therefor deſerts the dyett."

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is not circumſcribed by any ſtatutory regulation, or ancient act of Court, but has made a voluntary effort in favour of the pannel, out of a deſire to indulge him with information beyond what our ſtatutes have required; ſo he cannot found an argument on this indulgence, for a punctilious and formal accuracy in the notice that ſhall be given him, but muſt be content with that which is reaſonable in itſelf, and anſwers ſubſtantially the purpoſe which is here in view. Now as to this; it is too clear to admit of controverſy, that if the libel give him notice generally, of the proſecutor's intention to produce articles of a certain kind on his trial, ſuch as a piſtol, or a bludgeon, or ſundry pieces of linen or woollen ſtuff, being part of the ſtolen goods previouſly mentioned in the libel, he has no reaſon to complain; being thus warned to call for the things themſelves in the hands of the clerk of Court, and having full leiſure and opportunity to learn their diſtinctive marks, and to prepare his defences, if he any have, which relate to the ſpecial *corpora*. It is not intended, nor is ſuch the form of the notice, that the libel itſelf ſhall ſerve him for full and ſole information reſpecting the articles to be produced, (for, in that caſe, why put them into the hands of the clerk of Court till the very day of trial?); but as a warning only of a certain way in which he may have inſpection of them, and obtain a more perfect knowledge of their marks. That, in this courſe, it is poſſible for the proſecutor to withdraw the articles which he has lodged with the clerk, and ſubſtitute others in their room on the day of trial, is no concluſive reaſon to the contrary. So is it poſſible alſo to withdraw the libel or executions, and lodge other and better in their place. But none of theſe things is poſſible to be done, unleſs by concert with the clerk of Court, and through groſs corruption and falſehood on the part of that officer,

cer, one who is in a high ſtation of public truſt, and on whoſe integrity reliance muſt be had, that he will reſiſt all ſuch iniquitous attempts. Beſides, if ſuch a thing ſhould happen, there would be the ſame acceſs to detect the wrong, and the ſame means of ſpeedy and effectual redreſs, as in the caſe of any other malverſation of a perſon in public office. Many precedents to this purpoſe may be cited, which for brevity ſake I will omit, and take notice only of a few. In the caſe of Rendal Courtney, a caſe of theft and houſe-breaking, the libel gave an account of the articles carried off, in very general terms, as "ſeveral ſhirts belonging to the ſaid George "Keith, and table-cloths and table-napkins, and other move-"ables found in the ſaid houſe:" and the notice of the intended production was only thus: "there was found in his "poſſeſſion *ſeveral of the goods* that had been robbed from the "houſe of Cadham, at the time aforeſaid, and which are now "lying in the hands of the clerk of Juſticiary, that he may "ſee the ſame." Now, ſaid the pannel, this is too brief and too looſe a ſort of notice, and does not acquaint me with the marks of the particular articles which are meant to be produced. But on the proſecutor's anſwer, that the things themſelves were in the hands of the clerk of Court, where the pannel might have examined them, and ſo have prepared for his defence, the Court repelled the objection. The like brief and general notice was given, as follows, in the libel againſt John Macdonald, July 8. 1782, for repeated acts of theft: "And the ſaid declarations being to be uſed in evidence "againſt you, will, *together with ſome of the articles* carried off "as aforeſaid from the work-ſhop of the ſaid Alexander Hill, "*and ſome of the articles* contained in the bundle ſtolen from "the houſe of the ſaid James Fleming, and in the cheſt ſtolen "from off the cart of the ſaid Richard Waldie, and in the

Muſt the libel ſpecially deſcribe the things. July 29. Aug. 4. and 5. 1743.

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" trunk ſtolen from the cart of the ſaid Robert Murray, and " in the box ſtolen from the cart of the ſaid John Gardiner, " and in the box ſtolen from the houſe of the ſaid William " Campbell, in due time be lodged in the hands of the clerk," &c. Now, in this caſe, though a debate took place (of which preſently) touching the examination of the witneſſes as to ſuch articles which were *not* produced; yet as to thoſe which were in the hands of the clerk, it was not diſputed that ſufficient notice had been given of the purpoſe to employ them in the trial: And they were produced and made uſe of accordingly. This precedent is the ſtronger, as even in the narrative, the libel is very general with reſpect to one of the cheſts or bundles, which is mentioned only as " contain- " ing ſundry articles of wearing-apparel, ſeveral books and " other articles, all the property of the ſaid John Toſhoch." The libel againſt Thomas Gordon (February 4. 1782) for theft and aſſault, gives him notice thus: " Which declarations " will be uſed in evidence againſt you, and will be lodged, " together with the ſaid two piſtols, the knife, and the " great-coats above mentioned, in the hands of the clerk " of the Court of Juſticiary, before which you are to be " tried, that you may have an opportunity of ſeeing the ſame." None of theſe articles is deſcribed by any one mark, in any preceding paſſage of the libel. So, likewiſe, in Low-

March 18. 1783.

rie's indictment for robbery: " And the ſaid three de- " clarations, together with a watch and bludgeon mention- " ed and referred to in your declaration, emitted in preſence " of the ſaid Archibald Cockburn, being to be uſed in evi- " dence againſt you, will in due time be lodged," &c. No deſcription is any where given of either the watch or the bludgeon. The notice was equally general in the caſe of William Mills: " Which three declarations will be uſed in

July 1785.

" evidence

" evidence againſt you, and will, together with ſeveral of " the articles ſtolen by you, as above mentioned, alongſt with " an inventory[1] of the ſaid articles, and an extract of the " ſentence of baniſhment pronounced againſt you by the ſaid " Sheriff of Edinburgh, dated the 2d day of September 1784, " be lodged in the hands of the clerk of the High Court of " Juſticiary, before which you are to be tried, that you may " have an opportunity of ſeeing the ſame." No objection ſeems to have been made on this occaſion. A debate however took place, and judgment was given for the proſecutor, in two trials of ſtill more modern dates: In that of John Johnſtone for pocket-picking, where the libel bore that a pocket-book, " and " ſundry of the papers ſtolen therewith," were to be produced, and uſed in evidence: And in the noted trial of Smith and Brodie [2], where the objection was aſſiſted with this circumſtance,

June 19. 1786.

Aug. 27. and 28. 1788.

[1] It is to be obſerved, that the inventory was neither inſerted in, nor ſubjoined to the libel, but lodged with the clerk, along with the articles themſelves, to be ſeen there.

[2] The notice in the libel was thus: " *A gold watch* with a chain, *ſeal*, and " key; *a cheſt or trunk containing various articles; a five pound bank-note;* an " iron coulter of a plough, two iron wedges, an iron crow, a pair of curling-irons " or toupee-tongs, a ſpur, a dark lanthorn, *a pair of piſtols*, ſeveral falſe keys " and pick-locks, and two ſpring ſaws, are all to be uſed in evidence againſt you " the ſaid William Brodie and George Smith."

The objection bore, " That all theſe articles admit of a variety of concluſive " deſcriptions, ſuch as the maker's name and number of the watch, the device upon " the ſeal, the date and number of the note, and by whom iſſued, &c.; but no " ſuch deſcriptions are here given, ſo that the pannels are left without any legal " information as to theſe articles; and the proſecutor might as well have ſaid, " that *certain articles* are lodged with the clerk, to be uſed againſt the pannels " without any deſcription, even general, of what theſe articles are."

" They repel the objection ſtated to the producing and founding on the ar- " ticles ſpecified in the objection, and mentioned in the indictment, and allow " them to be adduced in the courſe of the trial."

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ſtance, that one of the articles in queſtion had not been lodged with the clerk of Court, till the morning of the day before the trial.

What if the articles are in the hands of others.

But what ſhall be done, where, as ſometimes happens, the writings or other articles which are meant to be uſed in evidence, are not in the proſecutor's own poſſeſſion? In this caſe, having raiſed his libel, he may apply by petition to the Court, and obtain a deliverance againſt the ſuppoſed poſſeſſors of ſuch writings, for obliging them to depone and produce: As was done on the libels for perjury, againſt John Lawſon and William Leſlie; and had alſo been done laſt century, with a view to certain trials for uſury, where the neceſſary vouchers were in the hands of third parties, or of the pannels themſelves. Caſes may be imagined, where the like interpoſition ſeems to be neceſſary even before raiſing the libel, and for enabling the proſecutor to lay his charge correctly.

July 1. 1785. Nov. 15. 1787.

The ſubject which we have now diſmiſſed, ſuggeſts an inquiry, how far in caſes of theft, houſebreaking, and the like, it is competent to interrogate the witneſſes concerning ſuch of the ſtolen articles, as are not previouſly produced in the hands of the clerk; more eſpecially if the libel has not deſcribed theſe in ſo minute and ſpecial a way, as to diſtinguiſh them from all other articles of the ſame kind. With reſpect to certain ſpecies of theft, ſuch as that of ſheep or cattle, it is very obvious that no ſuch doctrine could with any colour of reaſon be maintained. But in its application even to ſuch articles as are poſſible to be produced, this pretenſion has juſtly been overruled, in the only inſtance, ſo far as I know, where it ever was advanced. I allude

lude to the trial of John Macdonald, 8th July 1782, where the debate and judgment are as follows:

" THEREAFTER, Meſſrs CAY and ERSKINE for the pannel, " *objected* to any queſtions being put to any other witneſs, " *unleſs* concerning the cheſts or other goods produced, in ſo " far as they were not ſpecifically mentioned in the libel. " The ſpecifications of the articles being required by the " common law, uniform practice of this Court, and being alſo " required from analogy, by the ſtatute 1672, which orders " witneſſes to be ſpecially deſigned; and alſo from the de- " ciſion of this Court in the caſe of Gordon, where a pick- " lock was not allowed to be produced, in reſpect it was not " ſpecified.

" ABERCROMBY *anſwered*, That by the act 1672, it is requi- " red that fifteen free days before he be brought to trial, he " ſhall be ſerved with a liſt of witneſſes to be adduced againſt " him, and of the aſſize by which he is to be tried, that he " may have an opportunity of inquiring into the character " of the witneſſes and aſſizers; but no law requires, that in a " trial for theft, the ſtolen goods ſhould be produced *as evi-* " *dence*. It may often happen to be impoſſible to produce " the ſtolen goods, though it cannot on that account be men- " tioned[1], that evidence is leſs complete and concluſive.

" IN the preſent caſe, the witneſſes themſelves might have " produced the different articles now in Court, and the pan- " nel could not have objected to the witneſſes doing ſo. In " truth, therefore, the objection is founded on an indulgence " given to the pannel, to which he is not by law entitled. " Inſtead of being produced at the moment of the trial, the " goods

1 Should be *imagined*.

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" goods have been lodged in the hands of the clerk, where " the pannel had an opportunity of ſeeing them.

" BESIDES, the whole objections proceed on a miſtake in " point of fact; for, in this caſe, the goods are referred to " expreſsly in the indictment, and ſpecified with ſufficient " accuracy. The proſecutor was not poſſeſſed of the *whole* " ſtolen goods; and therefore, the indictment only bears, " that part thereof was to be produced.

" THE Lords Commiſſioners of Juſticiary having conſider- " ed the foregoing objection and anſwer, they repel the ob- " jection."

AND truly the diſtinction here hinted at by the able counſel for the Crown (afterwards, but, unhappily, for too ſhort a time, one of the chief ſupports and ornaments of the Criminal Bench) is perfectly juſt, and material to be remarked. Certainly nothing can be produced, properly ſpeaking, as an article of evidence in the hands of the clerk of Court, with reſpect to which notice has not been given in the libel, of the intention ſo to employ it: That is to ſay, no witneſs can produce any article in the courſe of his depoſition, to the effect of lodging it in the hands of the clerk of Court, there to remain as a part of the proceſs, and be the ſubject of interrogatories to the other witneſſes, and of evidence to be given by them, and finally to be left with the aſſize for their inſpection, when they ſhall incloſe. But as to the tranſient exhibition of any article by a witneſs, during the time of his own examination, and in connection only with his own evidence, and towards the better telling of his own ſtory, and which article, after ſerving this purpoſe, he carries away along

long with him; this is a proceeding of quite a different nature, and contrary to no law or cuſtom. For in ſuch a caſe the thing never is made part of the proceſs, or a ſubſtantive article of evidence: It ſerves only to aid and elucidate a particular depoſition. One, for inſtance, who has been aſſaulted and beaten with a ſtaff, and has made himſelf maſter of the ſtaff, may ſhow it to the aſſize when he depones, that they may the better underſtand the degree and nature of the violence which he ſuffered; but if no notice has been taken of this inſtrument in the libel, he cannot leave it with the clerk, to be ſworn to by other witneſſes who know it for the pannel's ſtaff; whereby the ſtaff itſelf would become part of the proof, and a ſubſtantive article of evidence againſt him.

I SHALL cloſe this chapter with juſt a word or two reſpecting the competent evidence for authenticating writings in a criminal trial. Mackenzie has intimated his opinion, that ſimilitude of hands is not ſuch a mean of proof as the Judge can properly rely on, but one which amounts to a ground of preſumption only at the beſt. We know too, that among the reaſons aſſigned for reverſing the attainder of Algernon Sidney, it was one of the principal, that this ſort of evidence had been employed. And perhaps the point muſt be yielded with reſpect to thoſe ſituations, if ſuch ſhall ever happen, where the proſecutor truſts to ſimilitude of hand alone, not ſtrengthened with any other likelihood or circumſtance of preſumption in the caſe; as if a perſon be accuſed of treaſon or ſedition, on the ſingle evidence of an unſigned writing, found in the cuſtody of ſome one who is a ſtranger to him. But it is no leſs fit to be conſidered on the other ſide, that men do not call witneſſes to the execution or delivery of writings of a criminal nature;

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and hardly in any caſe will it happen that the evidence ariſing from the likeneſs of hand, is not either ſtrengthened or diſcredited by the other particulars of the caſe. Thus, if writings are found, though unſigned, in the pannel's own poſſeſſion, and referable to tranſactions in which he can be ſhown otherwiſe to have had an active concern; or if letters ſigned with his name, are diſcovered in the poſſeſſion of his familiar friend, and anſwers thereto, addreſſed to him, are found in his own poſſeſſion; or if the minutes are produced of the proceedings of a meeting whereof the pannel was a member, and to which he is proved to have been choſen ſecretary or clerk; and in any of theſe caſes, if his hand be ſworn to by a competent number of credible perſons, who have cauſe of knowledge on that head; this ſeems to be ſuch a proof as there is no ſound reaſon for diſtruſting. Accordingly, in the trial of Campbell of Burnbank for falſehood and conſpiracy, where the libel reſted in a great meaſure on a writing in which Campbell, for a ſum of money received from Muſchet, obliged himſelf to procure two affidavits of the adultery of Margaret Hall, Muſchet's wife, the authenticity of this material document was proved chiefly by ſimilitude of hand [1]. The pannel's hand-

Mar. 29. 1721.

[1] There is this entry in the record, in the trial of John Ker for fire-raiſing, 13th Jan. 1792: "The laſt witneſs having been examined upon the handwri-"ting of the pannel, and he having identified the two letters from the pannel to "Robert Allan, and the liſt of furniture libelled on, and referred to in one of "the pannel's declarations, already judicially admitted by him to be the pannel's "handwriting to the beſt of his knowledge; his Majeſty's Advocates declares, "That he reſts the farther evidence that the two letters above mentioned are of "the handwriting of the pannel upon a *comparatio literarum*, which the jury "can make for themſelves, by ocular inſpection, between them and the acknow-"ledged ſubſcriptions to the declarations, and his handwriting in the liſt of fur-"niture

handwriting was eſtabliſhed, in ſome meaſure, by the like means, in the trial of James Stein for bribery; as alſo in the trials of Skirving and others for ſedition, in 1793 and 1794.

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Dec. 4. and 5. 1786.

" niture above mentioned, and referred to in his ſecond declaration of the 13th " Auguſt laſt." It does not appear on record, that any exception was taken to this, on the part of the pannel.

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CHAPTER XV.

OF PROOF IN EXCULPATION; AND OF PROOF IN GENERAL.

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IN the three preceding chapters, I have diſcourſed at ſufficient length concerning the ſeveral kinds of lawful evidence, and the manner of conducting the proof, on the proſecutor's part. Though of equal importance, that on the part of the pannel will not detain us ſo long; having in a great meaſure been anticipated in tracing the hiſtory of the interlocutor of relevancy, wherein, by common ſtyle, is inſerted the warrant for an exculpatory proof. According to the view which was then given of the notions of former times reſpecting the allowance of contrary proofs in the ſame trial, it muſt be obvious, that our form of proceſs was not likely to accommodate the pannel with any ſtated or effectual expedient for compelling the witneſſes on his part to appear. Mackenzie has told us accordingly, that till 1661, we had no ſuch thing as a precept of exculpation, or warrant to cite witneſſes for the pannel; who, if he had any defences of ſuch a kind as the practice of thoſe times would allow him to prove, muſt therefore have eſtabliſhed them by the witneſſes on the part of the proſecution, or by ſuch others as would

See vol. ii. p. 70. *et ſeq.*

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would attend voluntarily, at his desire: For it *was* not, in these circumstances it *could* not, be held a good objection to the witnesses for the pannel, as to those on the other part, that they attended of their own accord[1].

Precept of exculpation; when introduced.

After the Restoration, the Justice began, however, to interpose his authority for constraining the pannel's witnesses to attend; yet still not as a matter of course, or which was demandable of right, but on consideration only of the circumstances of the case, and the nature of the pannel's allegations. But not long after that period, precept or summons of exculpation, came to be acknowledged and confirmed as a point of lawful process, by the statutory regulations of 1672; of which it is one, "That when any criminal libel "or summonds of exculpation are given and execute against "any party, that at the same time lists of the witnesses to be "adduced for proving of the said libel and summonds, and of "the persons who are to pass upon the inquest, be also given "to them, to the effect the party may know what to object "against the saids witnesses and assizers, and may take forth "diligences for summonding of witnesses for proving of their "objections, why any contained in the said lists should not be "admitted to be a witnesse or upon the assize." It is thus made a condition of the benefit of this sort of precept, and in itself the thing is equitable, that by service of the letters and list of witnesses on the prosecutor, he shall have the like opportunity to inquire concerning the pannel's witnesses, as the pannel has to inquire respecting his. In the trial, therefore, of Lord Bargeny Mar. 16. 1680.

1 See a debate on this head in the case of Janet Corsar, (April 23. 27. 1641), which ended in the prosecutor allowing the witnesses to be examined; but under protest against its being construed as a precedent for future cases.

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Bargeny for ſedition, where the proſecutor aſked a delay, for this reaſon among others, that he had not been ſerved with a double of the letters and liſt of witneſſes, the Court liſtened to his plea[1], and granted a continuation of the diet. On the ſame day, to take away all pretence of ignorance of the law, they put an act of adjournal on their books, ordaining the ſtatute to be punctually complied with in this particular, for the future[2]. Mackenzie too, in his obſervations on the ſtatute 1672, confirms this rule with his opinion. Nevertheleſs, for many years paſt[3], it has been nowiſe uncommon

Obſ. on ſtat. p. 447.

[1] "The Lords, in reſpect that his Majeſtie's Advocatt wants ſome of his materiall witneſs, notwithſtanding that he has uſett all poſſible diligence for adducing them; and alſo, in reſpect that the pannall has neglected to give a double of his letters of exculpation, and a ſubſcrivit liſt of his witneſſes, for proving of his exculpation; do therefore continue the dyet till the ſecond Monday of June next," &c.

[2] "The ſaid day, the Lords Juſtice-Generall, Juſtice-Clerk, and Lords Commiſſioners of Juſticiary, did enact and ordaine, that all letters of exculpation to be hereafter raiſed, beare a warrand for making intimation thereof to the perſewars of the principall action, by delyvering a full double of the ſaid exculpation, with a liſt of the haill witneſs to be adduced, for verifying the groundes and reaſons thereof, to the perſewar."

[3] Lord Royſton, in one of his Notes, *ad p.* 242. No. 4., ſays, that an exculpatory witneſs was rejected in two caſes, becauſe his name was not in the liſt ſerved upon the Lord Advocate: the caſe of Macdonald of Barriſdale, Feb. 9. 1736; and the caſe of Macgrigor or Drummond, Aug. 3. 1736. Probably, the fact has been ſo, and has fallen under Lord Royſton's own obſervation; but it does not appear in the record, which was not uniform at that time, as to the engroſſing of objections to witneſſes. It appears too, from a petition for Francis Gordon, (Dec. 24. 1711), that his exculpations had been rejected, becauſe the executions did not bear that a copy of the letters and liſt of names had been delivered to the Advocate-depute.

mon for the pannel to overlook this injunction of the law, though never altered nor recalled; and the proſecutor has uniformly abſtained from taking advantage of the omiſſion. Indeed, it may be argued (and ſo it was in the aforeſaid caſe of Bargeny) that this ſervice of the liſt and letters is neceſſary to the pannel, for the purpoſe only of obtaining the aid of Court to compel[1] his witneſſes to appear; and that if he be willing to take his riſk of their attending at his deſire, he may ſtill have the benefit of them in this way, though he give no notice to the proſecutor of the particular perſons, nor even of his purpoſe of taking proof in exculpation.

Objections to the pannel's witneſſes. Near relations.

LET us now run over the ſeveral diſqualifications whereto the exculpatory witneſſes may be liable, though regularly called into Court. And, firſt of all, Is a witneſs diſqualified if he be nearly related to the pannel? On this head, our practice humanely deviates from the cautious rule which it obſerves in civil proceſs; and knowing, that the near kindred of the pannel may ſometimes be neceſſary witneſſes for his defence, it will not always refuſe to hear their teſtimony in his behalf, but will attend rather to the nature and exigency of the particular caſe and ſituation: though ſtill it will be for the conſideration of the aſſize, how far the evidence of ſuch witneſſes ſhall outweigh, or meet with equal credit as that of other and more impartial perſons. The brothers and ſiſters of the pannel have very commonly been received. In the trial of Elizabeth Orrock, for child-murder, her ſiſter, Jean

Mar. 1. and 3. 1715.

[1] Lord Fountainhall mentions, (March 17. 1684), that a warrant is granted in favours of Sir Hugh Campbell of Ceſſnock, priſoner, and indicted to all judges and magiſtrates, to force the witneſſes adduced in his exculpation, to come in and depone, if they ſhould refuſe to do it voluntarily.

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Jean Orrock, was called to prove the pannel's diſcloſure of her pregnancy; and although in their verdict, the jury took ſpecial notice of this circumſtance [1], as if doubting whether her evidence were lawful or ſatisfactory, yet the pannel had the full benefit of ſuch a diſcloſure, according to the practice of thoſe times. In the trial of Robert Thomſon, for murder, his brothers, James and Andrew, were received to prove his defence of lunacy: As a ſiſter was, to prove the like defence againſt the like charge, in the caſe of Sir Archibald Kinloch. In the noted trial of Carnegy of Finhaven, for murder, (Auguſt 2. 1728), his ſiſter ſwore to ſeveral circumſtances of groſs inſult and provocation, received by the pannel from the perſon on whom he drew his ſword. And a brother by affinity, ſwore to circumſtances for eſtabliſhing an *alibi*, in the trial of Smith and Brodie for theft. Nay more, in ſome inſtances, which I do not cite however as evidence of a general rule, even thoſe relations have been received, in whom nature muſt be preſumed to plead moſt powerfully in behalf of the accuſed. In the trial of James Chriſtie, for murder, Elizabeth Neil, his wife, was an exculpatory witneſs: though, to be ſure, his caſe was ſingular; for he had killed a man in the act of adultery with her, and he called her to prove the fact. In a caſe of aſſault, the pannel's daughter gave her teſtimony in his behalf, reſpecting provocation which he had ſuffered from the proſecutor in her preſence. Likewiſe, in the trial of Robert Young, for fire-raiſing and curſing of parents, Iſobel Haddoway, his mother, was called, and, after debate, was admitted as an exculpatory witneſs. In the trial,

June 18. 1739.

June 29. 1795.

Aug. 1788.

Nov. 15. 1731.

June 23. 1746. Caſe of Alexander Lockhart.

July 31. 1738.

[1] "*Verdict.*—Find it proven, that during the ſaid time the ſaid pannel Eliza-
" beth Orrock's being with child, ſhe revealed the ſame to Jean Orrock, the pan-
" nel's ſiſter-german, being one of the witneſſes: In witneſs whereof," &c.

trial, however, of Thomas Muir, which was for murder, the objection to the pannel's mother was ſuſtained; but here the woman was herſelf the cauſe of the homicide, having engaged in an affray with ſome of her neighbours, wherein the pannel, her ſon, interfering in her behalf, to reſcue her, had the misfortune to kill one of her opponents. Upon the whole, till I am better informed, I muſt conclude, with regard to the competency of the pannel's relations of the neareſt degree, that it is not the ſubject of any abſolute or indiſcriminate rule, but is matter for deliberation on the circumſtances of each particular caſe.

Objections to the pannel's witneſſes.

TOUCHING the diſqualifications of nonage, infamous character, receipt of reward, inſtruction how to depone, or the undue communication of the other evidence in the trial, the ſame reaſons ſeem to be applicable alike to the witneſſes on either part. But, in the article of enmity to the proſecutor, there is ſcarcely the ſame need of ſo ſtrict or rigorous a rule; as well becauſe it is not ſo likely that malice ſhall appear or be indulged in this ſhape, as becauſe it is a leſs evil if the pannel ſhall be acquitted, than if he ſhall be condemned, on evidence proceeding from ſuch a motive.

Objections to pannel's witneſſes. Intereſt in the iſſue.

THE ſort of intereſt in the iſſue of the proſecution, which more frequently than any other may be objected to the witneſſes for the pannel, is that of their being his aſſociates in the crime libelled. As to which it has already been mentioned, that if ſeveral perſons be called in the ſame indictment, and if the Court ſee cauſe for it in the circumſtances of the caſe [1], they

[1] Lord Royſton ſays, that in ſuch ſituations, ſometimes they are admitted *cum nota*, and when the proof is concluded, it will appear how far they are *ſocii criminis*, Notes, *ad p.* 244.

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they may disjoin the libel, and proceed to the trial, in the firſt place, of ſuch of the pannels who are meant to be uſed as witneſſes for the others, and will receive them in that capacity, if they ſhall be acquitted of the charge. Lord Royſton ſays, but I have not found it in the record, that this expedient was adopted in the caſe of Baillie, Watſon and others, two of whom being tried and acquitted, bore evidence on the trial of the others. This courſe was followed, however, in the trial of Macculloch, Macandliſh and others, a caſe which was mentioned under a former article of our ſubject. In regard to thoſe ſuppoſed aſſociates who are in cuſtody on charge of the crime libelled, and are ſtill meant to be brought to trial, they have not in any inſtance, as far as I have obſerved, been offered as witneſſes for the pannel; and if at all receivable in theſe ſuſpicious circumſtances, it can only be with reſervation of their credibility for the conſideration of the aſſize. The pannel cannot inſiſt here, to have his aſſociate tried in the firſt place, againſt whom there is no libel in Court; and the proſecutor muſt have his own choice of the proper and convenient ſeaſons, for inſiſting againſt the ſeveral perſons to whom ſuſpicion has attached.

Notes, *ad p.* 244.

July and Aug. 1714.

July 16. 1744.

See vol. i. p. 288.

Reference to the proſecutor's oath.

I WILL now briefly ſubmit to the ſtudent a few words concerning one mode of evidence for the pannel, or rather one means of abſolvitor, of which, ſuppoſing it even to be competent, but few inſtances can be expected to appear on record. It is obvious with reſpect to the public proſecutor, who has no perſonal knowledge of the ſtate of facts, but proceeds on the information laid before him, that he cannot be

minis, and guilty: For if they are, their teſtimonies will not be received. But this opinion ſeems to be liable to difficulties. And I find no inſtance of any ſuch proceeding as to original pannels, though there are inſtances of it (but that is a different queſtion) as to pannels by reconvention.

be called to ſwear on the pannel's reference of the libel to his oath. And even in the caſe of proceſs at a private inſtance, it ſeems at leaſt not to be a clear point, that our practice will or ought to ſuſtain a reference of the iſſue to the proſecutor's oath, ſo as to ſave him the trouble of proving his charge, or ſo as to hazard the pannel's defences *generally*, on the conſcience of his accuſer. It ſeems to be improper, that any one ſhould be allowed thus to *tranſact* as it were on his life, limb, or liberty, and the intereſt withal of public juſtice; and indeed it is a perverſion of the ſacred office of a jury, that they ſhould thus be made to interpoſe their verdict in the way of form, as it were, to this contract of the parties on the pannel's guilt or innocence, rather than to determine it according to their own conſcience and knowledge of the facts. I ſay, to give their ſanction in point of form: for without affixing the ſtain of perjury to the proſecutor, they cannot but decide according to his oath, if he ſwear to the verity of his libel, this being the only evidence before them; and yet they may not have a full perſuaſion in that way, of the juſtice of his charge. It ſeems to be a reaſon too for denying the pannel all recourſe to any other ſort of general oath, that he has the benefit of the oath of calumny, *in limine* of the trial. Again, in the caſe of the proſecutor having already taken his proof before the reference is made to him, it is not very obvious how a jury are to decide on this ſtrange aſſemblage of two different ſorts of evidence relative to the ſame facts, and which may be more or leſs diſcordant, and whereof properly the one ought to be quite excluſive of the other. It is true nevertheleſs, that in the caſe of Montgomery againſt Henderſon, for demembration, the pannel made a general reference of his plea of ſelf-defence to the proſecutor's oath; and that on his ſwear- Sept. 14. 1609.

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ing *negativè*, the trial went on to a conviction. But it is to be obſerved reſpecting this precedent, that according to the practice of thoſe times, in any caſe where the pannel was to be allowed an exculpatory proof, it was taken *in limine* of the proceſs, ſeparately, and before all other inquiries; ſo that in ſwearing in his own favour, the proſecutor here did not at once obtain a conviction, but open the way only to himſelf, for his own proof of the libel. Even in this leſs inconvenient form, of which in later times there could be no allowance, the above-mentioned proceeding ſeems to be ſingle of its kind [1].

Reference to the proſecutor's oath.

But although doubts may reaſonably be entertained, of the competency of thus hazarding the iſſue [2] on a reference of the libel, or of the defences at large to the proſecutor's oath; yet it is a queſtion of more difficulty, and hitherto, as far as I know, undecided, whether the pannel may not have the benefit of that mean of proof concerning ſpecial and ſeparate facts, ſuch as the proſecutor alone has occaſion to know, and with reſpect to which there can thus be no repugnancy of his oath to the evidence of the witneſſes on either part. Thus,

[1] In the trial of Thomas Neilſon, for ſtealing a horſe, (Sept. 10. 1661), John Henderſon, owner of the horſe, and purſuer of the libel, depones to the verity of the dittay, and that he heard the pannel make confeſſion of his guilt. But this oath ſeems to have been taken by the Court ſome how *ex officio:* For there is no reference to him; neither was it an oath of calumny; but was taken after examining the other witneſſes.

[2] In the information for Arbuthnot and Falconer, in their trial for an aſſault, (Feb. 2. 3. 1728), Arbuthnot objects to the circumſtances libelled for proving art and part, and "offers to prove by the purſuer's oath, that he has no qualifi-"cations of art and part, other than what is ſet forth in the libel, or his informa-"tion." No notice is taken of this offer, in the information for the proſecutor, nor in the interlocutor of relevancy.

Thus, in a caſe of aſſault, though the proſecutor by his witneſſes have proved the violence ſuſtained by him from the pannel; yet ſtill it may be true, that juſt before the attack, and while the parties were yet by themſelves, the proſecutor had given provocation in ſome ſhape, and brought the injury on himſelf. Now, ſhall the pannel not have the benefit of the proſecutor's oath on this ſpecial fact, ſo material to his defence? But this I only offer as a doubt of my own, not confirmed by any thing that I have obſerved in practice: And I will not purſue the queſtion any farther.

All proof muſt be in preſence of the aſſize.

THESE things are what ſeem to be chiefly obſervable concerning an exculpatory proof. In concluſion, I will now ſubjoin a brief notice of certain things which are true, in ſome meaſure, though not always to the preciſe ſame effect, of the proof on either ſide. One is, that no evidence is lawful or competent on either ſide, but that which is taken in face of judgment; in open preſence of the parties, and of the aſſize who are charged with the pannel: A rule which is grounded in the ſoundeſt reaſon, and moſt ſubſtantial juſtice. Not only becauſe it would be iniquitous, that either party ſhould privily communicate any thing to the aſſize; but becauſe it is only by obſerving the words, and manner, and even countenance and aſpect of the ſeveral witneſſes, that the aſſize can fully judge of the credit that is due to their teſtimonies: not to mention, that it is fit thoſe who are to decide on the evidence have an opportunity of ſearching into the fact, and eliciting the truth from the witneſſes on either part, by queſtions of their own. Theſe reaſons, in themſelves quite ſufficient, are confirmed in our practice, with the authority of a poſitive law, the ſtat. 1587, c. 91.; which proceeds on a narrative of the wrong ſuſtained in ſome inſtances

by

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by the pannel, through the malice of the proſecutor, in producing " writs and witneſſes and other probation as they " pleaſed to verifie the crime outwith the preſence of the " parties accuſed, whereby the juſt defence of their lives, " lands, and houſes was taken away." It appears, that this abuſe had more eſpecially been practiſed on the part of the proſecutor or his friends, by obtaining acceſs to the aſſize, when incloſed, after their removal out of Court. But to guard againſt ſuch iniquity in any ſhape, and make ſure proviſion towards the fair and open taking of all the evidence in face of judgment, the ſtatute hath ordered generally, " That " in all time cuming, the haill accuſation, reaſoning, writtes, " witneſſes, and uther probation and inſtruction quhatſum- " ever of the crime, ſall be alledged, reaſoned, and deduced, " to the aſſize, in preſence of the party accuſed, in face of " judgement, and na utherwayes."

All proof muſt be in preſence of the aſſize.

In virtue then of this excellent law, the pannel enjoys in the firſt place, full ſecurity againſt all private inſinuation of evidence to the aſſize, during the time of their continuance in Court. Whereby, if any perſon, with a view to injure the pannel, (for certainly it cannot avail him, if he himſelf or any of his friends try a device of this ſort, to aſſiſt him), ſhall privately hand ſome article of evidence to one of the aſſize, ſuch as a writing not libelled, or the declaration of ſome witneſs who has not appeared; and if this ſhall be ſhown to and conſidered by the aſſize, after incloſing; or even, in my private opinion, if it be kept and conſidered (and he muſt be preſumed to conſider it) by the individual juror to whom it is given; nay, though the juror thus tampered with ſhould inſtantly reveal the iniquity, which is complete as far as depends on the will of the proſecutor: this is contrary to the

expreſs

expreſs injunction of the ſtatute, and ſhall overturn the conviction and whole proceedings. For although the pannel be corporally preſent, yet is he not preſent (which is the meaning of the ſtatute) to the act of inſinuating this piece of evidence to the aſſize; nor is this probation "deduced in face of "judgment," as the law requires. The conſequence too of ſuch an attempt, is not in the loſs of the particular conviction only, but of all right of proſecution alſo on the matter of this libel, for the future: For the pannel has already undergone the anxiety of a trial, and he cannot be condemned to a renewal of that diſtreſs, owing to the fraud only and malice of his accuſer. Indeed in ſuch circumſtances, the preſumption of law muſt be in favour of the pannel, that but for theſe undue means employed againſt him, he would have had a verdict in his favour. Farther, independently of theſe reaſons in the nature of the ſituation itſelf, ſuch ſeems to be the expreſs appointment and ſanction of the act. For this ſtatute, c. 91., and the ſtatute, c. 92., immediately following, which begins with the word *item*, are truly but parts of one law or ordinance; whereof the common preamble is at the head of the act 91.; and whereof the ſanction, thrown in at the end of c. 92., and amounting to an abſolvitor of the pannel, is intended alike for all [1] the tranſgreſſions, which are forbidden in either the firſt or ſecond part of the law.

2. In

[1] The words are, that if the Lord Advocate's informer, or other perſon whatſoever, "ſhall pretend in ony wayis in time cumming, to informe, ſolliſt, reaſon, "diſpute, ſpeak or refrain to the ſaid aſſize, after their removing forth of judg"ment, and incloſing of them in manner above written, *or otherwiſe tranſgreſſe* "*ony point of this preſent act*; in that caſe the party accuſed ſhall be holden and "pronounced clear and innocent of the crimes and treaſons then laid to his "charge." Now, in the latter part of the law, or act 92., where this ſanction occurs,

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2. In the next place, under the words quoted, the pannel has the like protection againſt the producing of any teſtimonies to the aſſize, though in his preſence, and with his knowledge, which are not emitted by the witneſſes in the face of Court, and before the aſſize themſelves.

All proof muſt be in preſence of the aſſize.

It muſt, however, be allowed, that formerly, either the ſtatute had not been conſtrued in this broad and favourable ſenſe, but as relative only to the abuſe firſt mentioned, of the privy communication of evidence to the jury; or elſe that the enactment did not meet with that ſtrict regard and obſervance in practice, which were juſtly due to it. In many inſtances, ſometimes with, and ſometimes without the conſent of the pannels, and often for no very ſufficient cauſes, depoſitions were taken by order of the Juſtice, to lie *in retentis* (as it was called), that is, to be uſed in evidence when the accuſer ſhould inſiſt; and theſe were produced afterwards, and admitted as evidence in the trial. Of this there are numerous inſtances: I will mention but a few. The thing was done in the trial of
Aug. 3. 1636. Catharine Forbes, Lady Rothiemay; where the depoſitions were declared to be as ſufficient, as if led before the aſſize;
July 12. 1637. in the trial of Gavin and Alexander Dunbar; and in that of James and John Anderſon, April 21. 1640 [1]. In other inſtances, depoſitions were taken before the Juſtice, and were produced to the witneſſes on the trial, to be then renewed and adhered

occurs, there is no prohibition, but that of intercourſe with the aſſize, after their removal; ſo that *the other points of this preſent act*, are evidently the prohibitions in the former part of the law.

1 Mackenzie, Part 2. tit. 26. No. 17., finds fault with this, if done without conſent of parties, and ſays that it is contrary to the ſtatute.

adhered to; a way of examination which could hardly fail to conſtrain them in what they ſhould depone. Examples of this irregularity may be ſeen in the trial of Graham and Ramſay for theft; in that of William Muir of Caldwall and others for treaſon; and in that of William Barclay for ſlaughter; in which the whole evidence conſiſts of the renewal of former depoſitions, with ſome trifling additions made before the aſſize. Nov. 11. 1663. Aug. 16. 1667. Nov. 12. 1668.

All proof muſt be taken before the aſſize.

But theſe were not the only nor the worſt irregularities that were occaſionally ſuffered. It was not without example, that depoſitions were received of perſons whom the aſſize never ſaw at all, and ſometimes of perſons who had not deponed even before the Juſtices, nor under any authority derived from them, but before ſome inferior magiſtrate, and perhaps at a diſtance of time before the trial. On this ſort of evidence, Alexander Gylour ſeems to have been convicted of a rape; as was James Macrie of the like crime, in February 1650, on depoſitions ſome of them taken in March 1645. The ſame latitude ſeems to have been allowed as to part at leaſt of the evidence in the trial of Maxwell of Gerrarie for murder, and that of Michael Erſkine for ſodomy; both of whom were convicted, and had ſentence of death. Feb. 2. 1642. Feb. 20. 1650. Dec. 15. 1619. April 2. 1630.

All proof muſt be taken before the aſſize.

In later times, and indeed almoſt from the inſtitution of the preſent Supreme Court, there has been no room to complain of any ſuch irregularity or abuſe. The only proceeding of a modern date, which approaches even to a deviation from the rigid rule, is to be found in the trial of Duncan Macgregor *alias* Drummond, in January 1753, for the crimes of hamefucken and abduction. His brother James, had been tried on the ſame charge about a year before, and the ſame exculpatory Jan. 22. 1753.

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culpatory witneſſes were cited on both occaſions. Now, here their depoſitions in the firſt trial, were read over to them and adhered to before the aſſize, as their evidence in the ſecond. But this was done with the conſent of parties; and even on theſe terms, the like would not perhaps have been allowed, if the queſtion had been about the depoſitions on the proſecutor's part.

All proof muſt be taken before the aſſize. Aug. 6. 1753.

YET let me mention, that in the libel againſt Robert Macgregor for murder, an attempt was made to introduce what would have been a far more dangerous irregularity. In 1736, this man had been outlawed, on a libel for the ſame fact; and at that time, his brothers James and Ronald, who were accuſed as his aſſociates therein, had appeared and been tried. In the interval, Alexander Macinlifter, and Donald Macintyre, two of the proſecutor's moſt material witneſſes, had deceaſed: And to ſupply this defect, the Lord Advocate now propoſed to exhibit in evidence againſt Robert, the depoſitions of thoſe two perſons in the trial of his brothers; in which view the indictment referred to thoſe depoſitions, as extant in the record, and to an extract of them alſo, as lodged for his uſe in the hands of the clerk of Court. No judgment was ever given on this extraordinary propoſal; owing to a good objection which lay to the executions of the libel. But the proſecutor had no reaſon to expect ſucceſs in ſo dangerous a novelty; and he prudently abandoned the purpoſe, in renewing the indictment.

Hearſay not received as evidence.

As it is thus true, that our Judges will not liſten to the oath even, and very words of a witneſs on record, in any trial where the man himſelf does not appear; ſtill leſs will they pay regard to mere hearſay evidence, or teſtimony

ny by one witneſs, to the account which he has had from others, of the facts that are in queſtion. Thoſe others muſt be produced, to tell their own ſtory themſelves, and to ſay what they know concerning thoſe facts, of their own proper knowledge. In one inſtance only, does our practice deviate from this wiſe and prudent rule: Where the perſon from whom the witneſs had his relation of the facts, is no longer living to bear teſtimony himſelf; and where this perſon was alſo the beſt and moſt material of all witneſſes, the party ſufferer by the crime libelled, and gave his account of the matter in ſuch circumſtances, as naturally lend it a more than ordinary degree of faith. Thus, in caſes of murder, our Judges have always admitted evidence of the dying declaration of the deceaſed, even though purely verbal, and ſtill more if reduced into writing by any creditable perſon, with reſpect to the manner and guilt of his death; juſtly conſidering that ſuch material teſtimony, and given on ſo trying an occaſion, is of ſome weight in the ſcale of evidence and ſound reaſon, as a circumſtance and preſumption of guilt, though not to be received certainly as of equal value with an oath emitted before the aſſize. This doctrine has the ſanction of many precedents in various forms. In the caſe of William Roſs, the interlocutor ſuſtains this, among other articles of preſumption againſt the pannel, " And upon carrying the pannel to " the defunct's houſe, he the ſaid defunct, when on death-" bed, upon ſeeing the pannel, did declare, that he the ſaid " pannel was the perſon who gave him the wound." The libel againſt George Donald relates, " At leaſt, at the time " and place aforeſaid, the ſaid deceaſed *Robert Stewart* recei-" ved a wound in the belly, of which, in a ſhort ſpace, he died, " and upon the noiſe made by the firing of a piſtol, one of " the neighbours running immediately into the ſaid houſe,

Hearſay from party injured, now dead.

Feb. 16. 1719.

Aug. 4. and 11. 1730.

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" ſaw him the ſaid George Donald, with a piſtol in his hand, " which was ſmoking, and fire on the breaſt of the ſaid Ro- " bert Stewart's clothes, and having opened them, ſaw ane " wound bleeding, *and heard the ſaid Robert Stewart ſay, that* " *he the ſaid George Donald had ſhot him.*" Teſtimony was given to this material circumſtance, notwithſtanding the oppoſition made to it by the pannel. Indeed, in ſuch caſes, the dying declaration is properly a part of the fact, or ſtory.

Dying declaration of party injured, is a point of evidence. Nov. 18. 1751.

THE indictment of Norman Roſs, makes the like charge in theſe words: " And ſhe being yet able to ſpeak, declared to " the perſons preſent, that he (Norman Roſs) was the perſon " who had done that bloody deed, and directed them to look " for the knife, which was accordingly done, and found be- " hind the bed, beſmeared with blood:" And theſe things went to proof without objection. The like was allowed in

Aug. 12. 1754.

the trial of Nicolas Cockburn, for poiſoning her ſtepmother: A ſurgeon who attended the deceaſed, and Mr Dundas of Arniſton (afterwards Lord Preſident of the Court of Seſſion), who had acted as a Juſtice of Peace on the occaſion, deponed at large to the account which the deceaſed, in her illneſs, had given them, of the violent and ſudden manner in which ſhe was taken ill; of the pannel having prepared breakfaſt for her; of the various ſhifts and ſubterfuges which ſhe uſed to avoid detection; and in ſhort, of her whole grounds of belief, that the pannel was the cauſe of her death. There is another

Aug. 9. and 12. 1755.

caſe of murder by poiſon, that of Andrew Wilſon, who was tried for poiſoning his wife; and there the libel bears the like impeachment of the pannel, by the deceaſed upon her deathbed, thus: " And likewiſe, your ſaid wife, during her ſaid " laſt illneſs, did, in the preſence and hearing of ſeveral per- " ſons, expreſs ſtrong ſuſpicions of your having poiſoned her

" with

"with the ſaid drink." Laſt of all, I may appeal to the noted trial of Mungo Campbell, where Mr Moore, the ſurgeon who attended Lord Eglintoun on his deathbed, gave evidence of his dying declaration, with reſpect to the occaſion of his receiving the mortal wound. Feb. 26. 1770.

Dying declaration of party injured, is a point of evidence.

ALTHOUGH, from their nature, caſes of murder are the moſt frequent, they are not however the only caſes, in which this ſort of evidence may be employed. As appears from what paſſed in the trial of James Macgregor, for the abduction and forcible marrying of Jean Key. After being recovered out of the pannel's hands, and placed with a relation of her own, that unfortunate young woman had on the 20th of May, of her own accord, gone into the preſence of two of the Judges (the Lord Juſtice-Clerk and Lord Drummore), and had privately related to them the ſtory of her ſufferings, which was duly taken down in writing; and ſhe had afterwards, in preſence of the Court, confirmed and publicly adhered to this declaration. But at this time ſhe was in an infirm and languiſhing condition, in conſequence of the grievous outrages which ſhe had ſuffered; and ſhe died before the libel was raiſed againſt the author of her diſtreſſes. To ſupply, therefore, as far as might be, this material defect, the proſecutor libelled on theſe declarations of her's, as meaning to produce them by way of evidence [1] in the trial. Accordingly, after hearing counſel, the Court allowed them to be uſed as circumſtances of preſumption againſt the pannel: And they were again produced in the trial of Robert Macgregor, the aſſociate of James in this atrocious enterpriſe. Aug. 3. 1752. Aug. 6. Dec. 27. 1753.

As

[1] "And for proving that he the ſaid James was guilty as aforeſaid, there "would be produced againſt him, by way of evidence, beſide very creditable "witneſſes, the following documents in writing."

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Dying declaration of the ſufferer, is evidence for the pannel.

Dec. 23. 1726.

As teſtimonies of this ſort may thus ſerve to ſtrengthen the caſe againſt the pannel, ſo may they doubtleſs be referred to on his part, with equal credit, as far as they are favourable to his defence. Such an appeal was made, and profitably too, in the trial of Samuel Hale, a ſoldier, who had accidentally ſhot his comrade, Garret Rochford, in the courſe of ſome ſport that was going on between them. It was given in evidence that the deceaſed, when ſupported in the pannel's arms on his deathbed, bore teſtimony in his favour, thus: "That he verily believed that Samuel Hale, pannel, "knew not that the piece was loaded, and that he freely "forgave him, and ſtretched forth his hand and kiſſed him, "and ſaid he believed he meant him no harm, and that the "ſame was accidental." Hale, in conſequence had a verdict of acquittal. Though not attended with the ſame benefit to the pannel, the like evidence in a written form was allowed

Dec. 12. 1774.

in the trial of John Downie for murder; who produced the dying declaration of the deceaſed, taken down before witneſſes, by the miniſter of the pariſh. In one inſtance, and I believe in one only, a pannel had been allowed to avail himſelf of a teſtimony of a more unuſual kind. In the trial

Mar. 15. 1784.

of Alexander Reid, a revenue-officer, for murder, he founded on the declaration before a magiſtrate of John Farquharſon, alſo a revenue-officer, and one of the ſame party, who had likewiſe been accuſed of the murder, but was now dead. But this of allowing a deceaſed culprit indirectly to give evidence for another culprit on his trial, cannot be conſidered any otherwiſe than as an extraordinary indulgence, which was owing only to the Lord Advocate's conſent, given on account of the particular circumſtances of the caſe.

ANOTHER

ANOTHER article which equally concerns the witneſſes on either part, is, that in caſe of prevarication, or obſtinate concealment of the truth, they are liable to inſtant and ſummary judgment of the Court; who either of their own proper motion, or on that of the Lord Advocate, may ſend the offender to gaol for ſuch a time as ſhall be thought proper, or even, if the caſe require it, may apply ſome more ſevere correction. Unhappily, there has ſo often been occaſion to exerciſe this power of reprehenſion, that it is needleſs to confirm it with particular examples.

Single witneſs is not lawful evidence.

THESE things are what ſeem to be moſt worthy of obſervation, reſpecting the *province of the Court* in the matter of proof: For to them, and them only, it belongs to judge of the *competency* of the evidence, of whatſoever ſort, which is offered, and the regularity of the form in which it is brought forward. As to the *province of the jury*, which is to decide on the *ſufficiency* of the evidence laid before them; this is ſuch a matter which it would be raſh, at leaſt it equally exceeds my ability, and is beyond the deſign and compaſs of this work, to think of elucidating with any number of general precepts, which might be of any real ſervice towards the deciſion of particular caſes. Two or three things only I will venture to take notice of, as grounded in the univerſal opinion, and confirmed with numerous examples in every period of our practice. One relates to the direct mode of evidence, by the teſtimony of ſuch perſons who have had occaſion to ſee the deed done; and it is this, that on the teſtimony of a ſingle witneſs, no one ſhall be convicted of any crime. Though the offence be even of a low degree, and how high ſoever in itſelf the credit and character of the witneſs, yet ſtill the law is averſe to rely on his ſingle word, in any inquiry which may affect

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affect the perſon, or liberty, or fame of his neighbour; and rather than run the riſk of error, a riſk which is in a great meaſure obviated when there is a concurrence of teſtimonies, it is willing that the guilty ſhould ſometimes eſcape the due chaſtiſement of his tranſgreſſion. That ſuch is the ſettled rule of our law, was openly admitted by the counſel for the Crown, in the trial of Bertram and Lockie, indicted as art and part of a riot; nothing having appeared againſt Bertram but the oath of one witneſs, who ſaw him throw a ſtone at a party of ſoldiers attending on the occaſion. In conformity to the ſame rule, in the caſe of Enſign Hardie in June 1701, the jury found the libel not proven, "in reſpect "there is not ſo much as two concurring witneſſes to prove "any fundamental part thereof." Likewiſe, in the caſe of George and Janet Johnſtone, indicted for inceſt, the jury "finds no concurring witneſs upon any point ſua libelled, "and therefore the whole aſſize finds the libel not proven." So too, in the caſe of Anderſon, Hyndman, and others, accuſed of tumultuouſly deforcing the revenue-officers, and carrying off certain barrels of ſoap, which they had ſeized to his Majeſty's uſe, the jury found as to certain of the pannels thus: "As alſo, find it proven that John Hyndman, and John "Crawford, pannels, were in the mob, and, *by one witneſs*, "were ſeen carrying off ſome of the barrels that were taken "out of the barn; but do not find it proven that any of them "did violently beat, bruiſe or wound any of the cuſtomhouſe "officers." The Lords aſſoilzied theſe pannels; and this probably as being of opinion, that there was no lawful proof of their having carried off the barrels. I will mention two illuſtrations more; though, at firſt ſight, they may ſeem to be precedents on the other ſide. One is the trial of William Biſſet and Jean Currier, for the murder of Biſſet's wife.

July 16. and 17. 1792.

June 17. 1705.

Nov. 16. 1725.

July 3. and 8. 1705.

The

The woman confeſſed; and as to her the proſecutor reſtricted his libel to an arbitrary puniſhment: againſt Biſſet, he inſiſted for the full pains of law. The jury "found the libel proven "by one witneſs againſt William Biſſet *nemine contradicente;* "and with a cumulative probation, finds that the powder "found in the defunct's ſtomach Mary Murray, was the oc- "caſion of her death." Now, on this verdict, according to the cuſtom of thoſe days, which was to inflict ſome inferior puniſhment in caſes of defective proof, Biſſet had ſentence of tranſportation only, inſtead of that which awaited him if he had been convicted on full evidence of the murder. The like courſe was taken in the caſe of Gabriel Clarke, who was indicted for coining, and had ſentence of tranſportation on a verdict in theſe words: "Finds the coining and venting "of falſe ducadoons proven by one witneſs[1]." The Court had previouſly found it relevant to infer the pain of death, that he was art and part either of making or vending the falſe coin.

June 26. and July 2. 1705.

IT would not however be a reaſonable rule, nor is ſuch the law, that the want of a ſecond witneſs to the fact cannot be ſupplied by the other circumſtances of the caſe. If one man ſwear that he ſaw the pannel ſtab the deceaſed, and others confirm his teſtimony with circumſtances which correſpond to it, ſuch as the pannel's ſudden flight from the ſpot, the blood on his clothes, the bloody inſtrument found in his poſſeſſion,

Circumſtances ſupply want of a ſecond witneſs.

[1] The verdict has theſe farther words: "And as to the ſecond part anent the "purſe with the falſe ducadoons, finds proven by two concurring witneſſes as "libelled." But this ſecond part was only a preſumption ſtated in the libel, from his having, when taken, attempted to hide and ſecret a purſe with falſe coin.

CHAP. XV.

poſſeſſion, his confeſſion on being taken, or the like; certainly in reaſon theſe are as good, nay better even than a ſecond teſtimony to the act of ſtabbing.

Two witneſſes not neceſſary to each circumſtance.

WITH reſpect alſo to circumſtantial evidence, either in ſuch a caſe as was laſt deſcribed, or one where all the evidence is circumſtantial, it is not to be underſtood that two witneſſes are neceſſary to eſtabliſh each particular; becauſe, by the aptitude and coherence of the ſeveral circumſtances, the truth of the ſtory ſhall often be as fully confirmed, as if all the witneſſes were deponing to the ſame facts. It ſo happens, that on this queſtion, though falling ordinarily to be decided by the aſſize, we have in one inſtance the explicit opinion of the Court. This is in the trial of John Troublecock for murder, where the interlocutor of relevancy is as follows: "The Lords find that John Troublecock, pan-
"nel, at the time and place libelled, having been ordered
"by John Bartley, corporal, the defunct, to his ſentry-poſt,
"and thereafter, when the defunct was going along with the
"pannel towards his ſaid poſt, on their way he the pannel
"was heard to quarrel with the defunct, and found ſtruggling
"with him, and that the defunct was found wounded in the
"neck, and of that wound did immediately die, and that the
"pannel did endeavour thereupon to make his eſcape, and
"did acknowledge that the bloody bayonet which was found
"lying near to the place did belong to him, all jointly rele-
"vant to infer the pain of death and confiſcation of move-
"ables." The verdict is thus: "Find the pannel's endea-
"vouring to make his eſcape only proven by one witneſs,
"and the haill other parts of the interlocutor proved by
"concurring witneſſes." Now, after hearing counſel on the

Nov. 26. 1722.

Dec. 11. 1722.

import

Jan. 14. 1723.

Feb. 6. 8. and 10. 1718.

import of this verdict, the Court[1] proceeded to give ſentence of death. I obſerve too, that in the trial of Stewart Abercromby, where a number of circumſtances were found jointly relevant to infer the pannel's guilt, the jury had no doubt of convicting, although one of theſe, that of the pannel having been in a room, alone, with the deceaſed, in the houſe of Mrs Lindſay, was ſworn to by one witneſs only[2]. Yet I ſhall not affirm, that a caſe may not be imagined, in which one circumſtance ſhall be of ſuch peculiar weight, that an intelligent jury will neither convict on the other circumſtances without it, nor readily receive this important particular on the teſtimony of one witneſs only, at leaſt unleſs he be a perſon above all ſuſpicion. But it belongs only to the aſſize themſelves to diſcern this ſituation when it ſhall happen, and not to any lawyer to furniſh a rule beforehand, by which to diſtinguiſh ſuch a caſe from others.

[1] The Author is in poſſeſſion of copies of the written memorials which were offered to the Court upon this queſtion. For what reaſon he knows not, theſe memorials did not enter the record. They were given in without any order or interlocutor of Court, and perhaps it was on that account that the clerk did not think it proper to inſert them. That for the Lord Advocate, alludes to the informality in theſe words: "The proſecutor knows very well, that an application "of this kind is altogether inconſiſtent with the form of procedure before the "Court of Juſticiary, but ſeeing he underſtands it is the inclination of ſome of "your Lordſhips' number, that anſwers ſhould be given in; he therefore now "offers this memorial by way of anſwer, in order to remove what is ſuggeſted in "the paper on behalf of the pannel."

[2] I may take notice alſo of the caſe of James Patrick, (July 9. 10. 1675), a caſe of aſſault and beating, where the verdict bears, "and that the ſwords being "naked, is but proven by one witneſs." The Court ſeem to have held that this was proof ſufficient; for the conviction was followed with a ſevere ſentence.

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Single witneſſes may prove ſeparate acts of the ſame crime.

It ſerves as a ſtrong confirmation of the foregoing remarks, that the evidence of ſingle witneſſes has been held ſufficient even to eſtabliſh ſeparate acts of the ſame crime. In July 1738, Thomas Soutar, and James Hog, miniſter of the pariſh of Caputh, were accuſed at inſtance of Hagart of Cairnmuir, of the crime of attempting to ſuborn falſe evidence againſt him; whereof the libel charged a number of inſtances, which had happened at different times and places, and with relation to different perſons. The jury "found that the crime of ſub-"ornation, or endeavouring to ſuborn people to be witneſſes, "as libelled, againſt the pannel, Mr James Hog, proven in "ſundry facts, each fact *only* by one ſingle witneſs: As to "Thomas Soutar, the other pannel, they found him art and "part in the ſaid ſubornation." Parties were heard at large on the import of this verdict; and the iſſue was, that judgment paſſed againſt both pannels, for L. 250 of damages and expences, and baniſhing them from Scotland for their lives.

July 18. Aug. 1. 1738.

In this inſtance, the ſeveral acts, though all of one ſort, were truly diſtinct crimes, being attempts on the honour of ſeveral perſons. That judgment affords therefore an inference *à fortiori*, with reſpect to thoſe caſes where the accuſation is truly of the ſame crime, ſuch as adultery or inceſt, committed with one perſon on ſundry occaſions, or during a certain period of time. That is to ſay, the charge may be made good, though there be no concurrence of teſtimony as to any one act of inceſt or adultery, but only a number of witneſſes, each deponing to the ſeparate act which fell under his own obſervation; as in a caſe of divorce taken notice of by Mackenzie, though, apparently, with ſome doubt of the propriety of the judgment which was there given to that effect. But there ſeems to be little riſk of ſo extenſive a combination among

Part 2. tit. 26. No. 14.

among witneſſes, to ſwear a falſehood; and indeed, it is obvious, that perſons conſpiring to deſtroy the fame or ſtate of any one, are not likely to lay their project in that way, but rather towards the ſupport of each other in the proof of ſome ſingle act.

Is lawful to convict on circumſtances only.

In the obſervations which have now been made, I have aſſumed it as a lawful thing to convict on circumſtances only: And I will not here multiply caſes, in proof of a poſition which is not only vouched by the whole ſeries of our criminal records, but is grounded alſo in reaſon and neceſſity, and the law and practice of all other civilized realms. Certainly it muſt be allowed on the one ſide, that in any caſe of pure circumſtantial evidence, it is always poſſible that the priſoner may be innocent, though every particular be true to which the witneſſes have ſworn; a thing that cannot happen where they ſwear directly to the deed, as done in their own preſence. But, on the other ſide, ſuch is the difficulty of contriving an apt and coherent train of circumſtances, that perjury is far more eaſily detected in caſes of this deſcription: And the juſt influence of the former conſideration, is not utterly to exclude a ſort of evidence which is often irreſiſtible to the mind, and which, with reſpect to many crimes, is the only ſort of evidence that can ordinarily be obtained; but to recommend to jurymen the propriety of caution and reſerve, in which indeed they are ſeldom wanting, as to the ſufficiency of the preſumptions of guilt on which they are to condemn. One of the moſt remarkable caſes of this ſort, and where the arguments and authorities on the ſubject underwent the fulleſt diſcuſſion, is the caſe already mentioned, of Stewart Abercromby; who was convicted of murder, owing to the circumſtance chiefly of having left his hat in the

Jan. 1718.

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tavern where he and the deceaſed had been together, juſt before the mortal rencounter. The interlocutor of relevancy in that caſe was recited on a former occaſion. And here I muſt obſerve, that the ſpecial judgments of this kind formerly in uſe to be pronounced, exceptionable as they were in many reſpects, have, however, been attended with this benefit, that they have preſerved to us, in the cleareſt and moſt authentic form, the opinions on this head, of the men the moſt able, and the moſt habituated, to judge of the nature of the evidence in criminal caſes.

Evidence of the plea of *alibi*.

I WILL now terminate theſe curſory obſervations concerning evidence, with ſome notice of the plea and proof of *alibi*; one of thoſe defences which are moſt frequently reſorted to, and which, when duly qualified, and fully proved, is doubtleſs among the moſt relevant of any; but which requires to be very cautiouſly guarded, as to the terms in which it is found relevant, and the ſufficiency of the evidence that ſhall be ſuſtained to prove it. Becauſe the pannel's allegation is not concluſive, unleſs the *alibi* be circumſtanced and qualified in ſuch a manner, as makes it not unlikely only, but impoſſible for him to have done the deed at the time and place libelled; becauſe, in many caſes, the proof of *alibi* tends directly to impeach the veracity of all the witneſſes on the other part; and becauſe this of *alibi* is a plea of that ſhort and ſimple nature, with reſpect to which the pannel's witneſſes can eaſily contrive an uniform, though falſe ſtory, ſuch as it may be difficult for the proſecutor to diſprove, more eſpecially as he can cite no new witneſſes in reply. Theſe conſiderations ſeem always to have met with the due regard from our Judges, in determining on this ſort of plea.

IN

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Caſes of *alibi*.

In the trial of Andrew Fairney and others, for rioutouſly plundering a ſhip in the harbour of Leven, it was pleaded for Arnot and Niven, that they were employed in their own houſes, during the time of the tumultuous proceedings. But it appeared that their houſes were ſituated in the town of Leven, and at or hard by the ſcene of action; and as the pannels did not ſpecify the particular hours during which they were at home, ſo the Court, while they ſuſtained ſeveral other defences, paſſed over this one without notice. The like opinion was held of the plea of *alibi*, in the trial of William and Alexander Fraſer for fire-raiſing. They offered to prove, that on the night libelled they went to bed at eleven o'clock, and that they were found in bed next morning, after the fire had taken place: But as the diſtance was only two miles, it was very poſſible they might riſe and do the deed, and return to bed in the courſe of the night.

July 25. 1720.

Nov. 7. and 8. 1720.

Caſes of *alibi*.

We have another inſtance of the like caution and reſerve, in two ſeveral judgments which were given on the defences for James and William Darrach, in their trial for acceſſion to the great tumult at Glaſgow in 1725, which continued during two ſucceſſive days. With regard to the laſt of theſe, being Friday, it was at firſt only ſtated for the pannels, that "they were at *twelve* o'clock in Earſton, in the pariſh "of Kilbride, and they were at the ſame place about *four* in "the afternoon, and that at *ſeven* that evening they were in "Ru-glen, on their return to Glaſgow, which is two miles "ſouth-weſt from the town." Though not likely, it was thus not impoſſible, that in the interval between *twelve* and *four*, the pannels might go from Earſton to Glaſgow, which is but a few miles off, and ſo be preſent at the attack on his Majeſty's troops, which took place in Glaſgow,

Oct. 1. 1725.

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gow, about *two* of the afternoon. The firſt interlocutor paid, therefore, no regard to this allegation. In conſequence, the pannels judged it proper to ſtrengthen their plea with mention of two places more, where they were at *two*, and at *three* o'clock, of the ſame day; and then the Court ſuſtained their defence of *alibi*, as follows: "additional defences being offered for James and William Darrachs, viz. that upon Friday the 25th June laſt, they were at *twelve* o'clock noon "in Earſton, in the pariſh of Kilbride, and that they were at "the ſame place about *four* of the afternoon, and at *ſeven* "that evening they were at Rutherglen upon their return to "Glaſgow two miles ſouth-weſt from the town, and that they "were at Lang Calderwood at *two* o'clock in the ſame afternoon, and at Upſtart Hall at *three* o'clock, aforeſaid on the "ſaid Friday the 25th June, and that both theſe two laſt "places are *ſix* miles from Glaſgow; the Lords finds the "ſame relevant to exculpate them from any facts alleged to "be actually done by them during the ſaid time."

Caſes of *alibi*.

I MAY refer alſo to the caſe of Walter and John Buchanan, where it was pleaded with reſpect to one charge of depredation, that on the evening of the night libelled, and on the morning following, Walter was at a place eighteen miles off, and John at a place ten miles off from the *locus delicti*. But the interlocutor, though long and ſpecial, takes no notice of this allegation; probably becauſe the pannels did not ſay where they were, or how employed, in the courſe of the night itſelf. In the ſame caſe, a plea of *alibi*, ſet up againſt a charge of fire-raiſing, was equally unſucceſsful, though ſtrongly qualified as to the evidence of the pannel remaining in bed throughout the night; becauſe the diſtance was ſo ſmall (not more than a mile and a half),

Jan. 15. 1728.

half), that a ſhort time was ſufficient for him to do the deed and return to bed. The aſſize gave their verdict on the like views, in the trial of Smith and Brodie. The houſebreaking here, was proved to have taken place at the hour of half paſt eight of a certain evening; and ſeveral witneſſes had ſworn poſitively to the preſence of Brodie on the occaſion. On the other hand, two women, but not of the beſt fame, ſwore, that at eight of that evening he came to their houſe, ſituated in the ſame town where the deed was done, and remained there conſtantly till next morning. But, partly on account of the lower credit of theſe witneſſes, partly becauſe there ſeemed to be no ſufficient reaſon why they ſhould note ſo accurately the preciſe hour of Brodie's coming to their houſe, the jury were not ſwayed by their evidence in his behalf.

Aug. 1788.

Caſes of *alibi*.

THE terms of ſuch interlocutors which have given effect to the plea of *alibi*, are ſo ſtrict and ſpecial, that even theſe, almoſt equally with thoſe which have overruled it, may ſerve for illuſtrations of our caution and reſerve on this head. Take, for inſtance, that in the caſe of Houſton and Walkinſhaw: "Suſtains the defence of *alibi* in the terms following, "viz. That the day libelled, the defenders were at ſermon in "the forenoon at old Walkinſhaw's houſe; that they dined "together there with others, till about two in the afternoon, "and continued there from betwixt three and four, till af-"ter five, attending the catechiſing of the ſervants and fa-"mily worſhip, and at ſix they went to ſupper, which laſted "till eight, and that even in the intervals they were ſeen in "and about the houſe of Walkinſhaw." The libel here was for a houſebreaking, which was executed at four of the afternoon; and the place was diſtant a mile from the houſe of

Aug. 7. 1704.

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Walkinſhaw, the reſidence of the pannels, and was ſeparated from it by a rapid ſtream, which muſt have been paſſed in a boat: According to the ſtory told in the libel, the actors muſt have had time too for diſguiſing themſelves with change of dreſs, and otherwiſe. The pannels ſucceeded, however, in proving the *alibi* as reſtricted.

Caſes of *alibi*. Aug. 7. 1714.

In the trial of William Baillie, and others, for ſundry acts of theft and houſebreaking, it was found relevant to excuſe them as to three of theſe committed on certain nights, "That "they, or any of them, were late at night, and early next morn- "ing, at the time libelled, in the town of Blyth, in the ſhire "of Tweedale, being about thirty miles diſtant from the ſaid "houſes of Smeaton, Pilmour and Gilmerton, libelled." On

Nov. 21. 1720.

the plea of Chriſtopher Hogg, in his trial for robbery, the *alibi* was ſuſtained thus: "Suſtains the defence, that upon "the fifteenth day of July laſt, being the day the robbery "was committed, he the ſaid pannel, about the middle of "that day, mounted a horſe that he had hired at Phendrick's "ſtable in the Pleaſants, and went from that to Seton, where "he continued till about ſix o'clock at night." The fact of which this man was accuſed, had been done at an early hour of the evening, at a place called Ingliſton Bridge, in the county of Tweedale, twenty miles from the village of Seton, where the pannel had that day been employed till ſix of the evening. He proved his *alibi*, and was acquitted.

Caſes of *alibi*. Mar. 14. 1726.

In the trial of Thomas Pyrie, and others, for a tumultuous diſturbance of public worſhip, the Lords "ſuſtained it rele- "vant to James Simpſon, James and Andrew Gibbs, that on "that day, and during the whole time of the ſaid diſturb- "ance and invaſion, they were at Gordon Caſtle." The

diſorder

diſorder here laſted only a few minutes, and Gordon Caſtle is two miles off from the ſcene of action. In the trial of William Sutherland, and others, for deforcement, (June 20. 1715), the Lords "ſuſtained the defence of *alibi* proponed "for the ſaid William Macangus, &c., viz. that they were, "the ninth day of April laſt, being the day libelled, from "ſun-riſing till paſt twelve o'clock at noon, conſtantly em-"ployed at their labour a mile diſtant from the houſe of "Skelbo, to elide the ſaid libel *quoad* them." In the trial of Donald Robertſon, for aſſaulting revenue-officers, (January, February 5. 1728), it was found relevant for the pannel, as to one act, that at the time libelled, he was attending a certain funeral, filled out liquor to the company, and went with them to the church-yard, where he was when the account of the deforcement was brought thither; and as to the other act, that during the whole day he was employed in harveſt work, in ſight of others, at the diſtance of two miles from the ſcene of action. The words of the interlocutor are: "But for eliding the above relevancies, ſuſtained the defence "of *alibi*, *as circumſtantiate* by the pannel at the reſpective "times, relevant."

Effect of a proof of *alibi*.

As mentioned on a former occaſion, the benefit of the plea of *alibi* is, that it obliges the proſecutor to be more ſpecial than he need otherwiſe be, in his proof of the time of the offence. If he have it not in his power to be ſo, it muſt then be preſumed in favour of the pannel, that the act libelled took place at that period to which his proof of *alibi* applies. In which caſe, as alſo if the proof on the one ſide be contradictory of that on the other, it will lie with the jury to determine which proof is the more credible of the two.

CHAPTER XVI.

OF THE VERDICT OF ASSIZE.

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AFTER the cloſe of the proof on both ſides, the counſel for the parties addreſs, or, as we call it, *charge* the jury on the import of the evidence; and here the pannel has right to the laſt word, except in caſes of treaſon. Next, in obedience to the ſtatutes which diſpenſe with taking down the depoſitions in writing, the preſiding Judge has to ſum up the evidence to the aſſize; accompanying it with ſuch advice and obſervations, as may ſeem proper for enabling them the better to form their judgment of the caſe. And indeed even before thoſe ſtatutes, which impoſe this piece of duty on the Judge, it was always his privilege to enlighten and inform the aſſize with his opinion and ſentiments on all matters of law, as far as any ſuch were involved in the iſſue. More eſpecially it was neceſſary for him to beſtow this pains, after the practice came to be eſtabliſhed of giving out the interlocutor of relevancy in ſuch ſhort and general terms; whereby, without the benefit of this ſort of aſſiſtance towards underſtanding the nature of the crime, the various modes of art and part, the relevancy of the ſeveral defences, and the ſufficiency

ſufficiency or lawful credit of the different ſorts of evidence, the aſſize might often be miſerably at a loſs on theſe heads, and might ſuffer all that embarraſſment and perplexity of which Mackenzie ſo heavily complains[1], from the ſubtlety of lawyers, in alleging ſtatutes, deciſions, and doctors, to thoſe who underſtand none of them. Laſt of all, which terminates this firſt part of the trial and ſederunt, the Court pronounce an interlocutor, ordaining the aſſize to incloſe, and appointing an hour when the Judges and parties ſhall again attend, to receive the verdict from their hands.

But here, before following them into their ſtate of *incloſure*, I am to take notice of thoſe circumſtances of duty and precaution (purpoſely reſerved for this place, that we may have the more connected view of them,) which the aſſize have to obſerve before incloſing, and from the time when they are firſt ſworn into their office.

No adjournment of diet, after ſwearing the aſſize. 1587, c. 91.

I. Something has already been ſaid concerning that ſtatute, which provides againſt the privy communication of evidence to the aſſize, without the knowledge of the pannel or the Judge. But farther, at common law, and independently of that enactment, which indeed introduces no new rules relative to this period of the trial, certain things fall to be obſerved by the aſſize; that they may be fully poſſeſſed of the whole evidence in the caſe, and may not be expoſed to importunity, ſolicitation, or influence of any ſort, but may incloſe to determine on the matter, according to the pure and unbiaſſed

[1] In the caſe of Katharine Nairne, in Auguſt 1765, an objection was ſtated, very improperly, to this part of the Judge's office, which met with the reprehenſion it deſerved.

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unbiaſſed dictates of their own conſcience. To ſecure this important object, our cuſtom forbids in the firſt place all adjournment of the diet after the aſſize are ſworn; becauſe, in conſequence of ſuch a diſperſion, the jurymen would return into a ſtate of free intercourſe with the world, and be expoſed, ſeverally, not only to the ſolicitations of thoſe connected with the parties, but to the contagion alſo of all the rumours, opinions and ſurmiſes which may be abroad concerning the fact, or the evidence and incidents in the trial. Be it therefore attended with ever ſo great a diſadvantage to the proſecutor; ſtill, after allowing the trial to proceed this length, he muſt be content to let his charge take its fate with this aſſize, and on this libel, and with ſuch evidence as he can command at this time. It is true, there have been inſtances of ſuch an adjournment, and ſome at ſo late a period even of the proceſs as after the concluſion of the proof and debate, when, as we ſhall ſee, ſuch a proceeding ſeems to be forbidden by the poſitive injunction of a ſtatute. This irregularity appears to have occurred in theſe trials; that of John Lock and others (May 11. 1549); of Margaret Wallace (March 20, 21, 22. 1622); of John Strachan (Nov. 26. 1664); of Finlay Macgibbon (Dec. 2. and 3. 1669); of Robert Robertſon (Auguſt 4. and 5. 1673); and of James Muirhead and others (March 18. and 19. 1681). But on all theſe occaſions, with the exception of the caſes of Wallace and Macgibbon, where the pannels were convicted, the libel was not proſecuted to any farther iſſue after the adjournment: and in regard to Macgibbon's caſe, as the proceedings ſeem to have been thought queſtionable in the opinion even of the lawyers of thoſe days; ſo they have met with the cenſure of all impartial judges in later times, and been conſidered, both in this and ſome other reſpects, as a blot in our records.

In

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No adjournment of diet, after ſwearing the aſſize.

In the modern practice, ſo much is the importance felt of maintaining a ſtrict reſerve in this particular, that even in a caſe of interruption owing to unavoidable accident, ſuch as the ſudden illneſs of a juryman, or of the pannel himſelf, there ſtill can be no adjournment of the ſitting, nor any continuation of the trial with the ſame aſſize. The courſe in that event, which is juſtified by the neceſſity of the ſituation, is to diſcharge that aſſize, and renew the trial, as from the beginning, with another. This point was ſettled in the caſe of Janet Ronald [1]; where, in a trial on a Circuit, one of the jury had been taken ill while the proſecutor was addreſſing them, and the Judge, in conſequence, had adjourned the diet till next day, when the aſſize incloſed, and found a verdict againſt the pannel. Now, on conſideration of this matter by the whole Lords of Juſticiary, to whom the matter was remitted on the motion in arreſt of judgment, they found, "That after the jury was ſworn and charged with "the pannel, the trial ought not to have been adjourned, but "that from the neceſſity of the caſe, the jury ought to have "been diſcharged, and the pannel ſubjected to a new trial, "and therefore, as in this caſe the trial was adjourned, and the "jury

July 11. 1763.

[1] A great part of the *argument* in the caſe of Janet Ronald, was laid on the ſtatute 1587, c. 92., as contravened by the adjournment. But, in my private opinion, the judgment was good at common law, upon the uſage of the Court, without any regard to that act, which indeed ſuppoſes that the aſſize, when once ſet, are only to remove out of Court for the purpoſe of incloſing, and thus far *indirectly* affords an argument in confirmation of that uſage, but whereof the ſanction only relates to the period after the cloſe of the proof and debate. As I underſtand the judgment, it proceeded on the common law. It was impoſſible to conſider, "the haill perſute, defences, and anſwers thereto, as fully heard by the "aſſize;" when the proſecutor had not yet finiſhed his charge, nor the counſel for the pannel been heard at all. Only one of the Judges put his opinion upon the act. (See Notes of the opinions, Maclaurin, p. 760.)

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" jury ſeparated after they had been ſworn, or charged with " the pannel, and that the jury did thereafter return a ver- " dict; they find the proceedings null and void, and for that " reaſon aſſoilzie the pannel *ſimpliciter*, and diſmiſs her from " the bar."

No adjournment after ſwearing the aſſize.

A DECISION in ſome meaſure to the ſame purpoſe, had been given in a former caſe, the advocation at inſtance of William Wilſon and James Walker, of a libel depending againſt them before the bailie of the regality of Carſtairs. It appears, that after the proof had been taken, and before incloſing the jury, the pannels had made intimation of a fiſt obtained by them on a bill of advocation: Whereupon, out of reſpect for that injunction, the bailie adjourned the diet, and the jury diſperſed. It thus became a queſtion, diſtinct from all the other grounds of complaint in the caſe, whether it were now competent for the inferior Judge to proceed any farther in the trial of this indictment. The judgment was

Nov. 7. 1726.

thus: " Find that the bailie of the regality of Carſtairs, " could not then proceed in the proceſs, in regard the aſſize " was choſen, and the witneſſes examined before them, and " that the aſſize did not incloſe upon the proof, and return a " verdict thereupon before ſeparating. In this caſe, however, which differed from that of Ronald, in as much as the jury never incloſed, nor found a verdict, as well as that the proceedings here were interrupted by the act of the pannels themſelves, the Lords added a reſervation of the proſecutor's right, if he ſhould be ſo diſpoſed, to inſiſt in a new indictment: " But reſerve it to the purſuer in the principal cauſe " to inſiſt in any other libel or indictment, to be intented at " his inſtance againſt the defender for the ſame crime, the " Lord of regality naming another bailie for that ſpecial " effect,

"effect, the defender being ſerved with a legal aſſize, he be- "ing a landed man."

What if the proof cannot be taken in one diet.

ANOTHER reaſon which may ſometimes be urged for an adjournment, is that which ariſes from the great compaſs of the caſe, and extraordinary length of the proof; if it be ſuch as the aſſize cannot without difficulty diſpatch in a ſingle ſitting. But as caſes of this deſcription are very rare, and as any ſuch indulgence is plainly of bad example, and is founded in conſiderations of convenience rather than of abſolute neceſſity; ſo it will never be ventured on without the conſent of the pannel, and indeed ſhould not eaſily be allowed, under the ſafeguard even of that condition. I have met with but one inſtance of ſuch a proceeding: This is in the noted trial of Provoſt Stewart; and there it is entered in the record, that the adjournment was allowed in reſpect of the conſent of the pannel, and of his Majeſty's Advocate, and the neceſſity of the caſe. The motion for it came from the aſſize themſelves, who ſet forth that they had ſitten upwards of forty hours without intermiſſion, and that ſome of their number could continue their attendance no longer: In which complaint they were ſupported by ſome of the witneſſes, who had given notice to the Lord Advocate to the ſame effect.

Oct. 27. 1747.

No intercourſe with the aſſize after they are ſworn.

II. As all adjournment of the diet is thus forbidden, on account of the danger of bias and corruption with reſpect to the aſſize generally; ſo is it proper likewiſe with regard to each one of their number, that attention be paid to his ſituation and demeanour during the trial, and that he have the like protection againſt any ſort of importunity or ſolicitation: as well as it is naturally indiſpenſable, that every one of the aſſize be preſent during the whole courſe of the trial, leſt

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ſome material circumſtance eſcape his notice, or he loſe the opportunity of judging by his own obſervation, of the manner in which ſome part of the evidence is given. More eſpecially this precaution is requiſite, according to the modern practice in the Supreme Court, of receiving the whole evidence *vivâ voce;* whereby any aſſizer who is abſent for a time, no longer enjoys the ſame opportunity as formerly, of learning from the record what has been ſworn in his abſence. To ſecure, therefore, theſe objects of full information and abſolute impartiality, and to avoid the ſuſpicion even of any wrong in ſuch important articles, our uſage enjoins, that no aſſizer, once entered on his office, ſhall leave his place but with permiſſion of the Bench, or without being attended by one of the officers of Court: Likewiſe, the proceedings ſhall ſtop till his return; and no perſon ſhall have intercourſe with the aſſize, or any of them, either in or out of Court, by converſation or otherwiſe, at any period of the trial.

Effect of intercourſe with the aſſize.

But although ſuch be the general precept of our cuſtom, and doubtleſs very fit to be carefully obſerved, yet ſtill, there is an obvious and ſubſtantial difference between an adjournment of the diet, which is entered on the record, and is followed with the diſperſion of the aſſize for hours, ſo that the trial and evidence are likely to be leſs or more the ſubject of their converſation with others; and the caſe of the ſhort and accidental abſence of one aſſizer at a time, or ſome ordinary and paſſing intercourſe with one or more of them, which leaves the ſederunt undiſſolved, and the aſſize ſubſiſting, as well in fact as on the face of the record. Now, ſince we have no ſtatute relative to this ſtage of the trial, as with reſpect to the period after incloſure, which declares that the whole proceedings ſhall be vitiated by any manner of inter-

courſe

courſe with a juryman, how trifling and ſhort ſoever; ſo in all queſtions concerning errors of this ſort, it is matter of inquiry on the caſe as at common law, and on the principles of ſubſtantial juſtice and a fair trial, whether the irregularity be ſo material as to annul the proceſs, or of a venial and excuſable nature only. The abſence of a juryman, or the intercourſe had with him, may either be ſhort and tranſient, and free from all ſuſpicion, or any poſſible prejudice to the pannel, or it may be of the contrary aſpect and character; and the Court will determine in the matter, as they find on inquiry that the fact is of the one deſcription or the other. Accordingly, notice may be taken of the following inſtances, in which the trial and conviction were ſuſtained, notwithſtanding inadvertencies of this ſort in the behaviour of ſome of the jurors before incloſing.

Caſes of intercourſe with aſſizers.

Feb. 19. 1767.

SUCH was the caſe of Elizabeth Macnaughton, who offered a bill of ſuſpenſion of the ſentence of an inferior court, on this among other grounds, that certain of the jurymen had ſucceſſively left the Court, and been abſent for a time, while the witneſſes were under examination. But the anſwer was thought good, that thoſe jurymen had retired only for neceſſary purpoſes; had gone to no diſtance; had ſpoken to no one; and were none of them abſent for more than a minute or two at moſt. The bill was therefore refuſed.

Feb. 19. and Mar. 16. 1767.

THE like was the fate of the ſuſpenſion, purſued by Peter Biſhop[1], of a ſentence of the Sheriff of Renfrew. All the

[1] "They ſuſtain the reaſons of ſuſpenſion of the ſentence of the Sheriff, founded on the Sheriff's want of juriſdiction to pronounce ſuch ſentence; *but repel the whole other reaſons* of ſuſpenſion; and therefore," &c.

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irregularity in this inſtance appeared to be, that a juryman had left the Court unattended, while one witneſs was ſigning his depoſition, and another was called in and ſworn.

Aug. 1765.

Objections of the ſame kind were repelled, and not without ſome cenſure of the manner of propoſing and inſiſting on them, in the caſe of Katharine Nairne; where, owing to the great length of the ſederunt, it was found neceſſary to allow the aſſize ſome intermiſſion and refreſhment; in the courſe of which, but always in the preſence and under the eye of the Court, ſome ſlight and tranſient intercourſe was alleged to have taken place between ſome of the aſſize and the counſel in the trial, or other perſons attending in their duty on the occaſion.

Caſes of intercourſe with aſſizers.
July 1. 13. and 15. 1784.

In the ſuſpenſion of a ſentence of the Judge-Admiral againſt Maciver and Maccallum, it appeared that a juryman had retired, and that a witneſs continued to be examined in his abſence. The Lords, however, refuſed to ſuſpend the ſentence; becauſe this juryman had been abſent neceſſarily, and for a few minutes only, and had been attended by an officer of Court, and heard the whole depoſition read over on his return.

Jan. 9. and 17. 1754.

But by far the ſtrongeſt precedent in this matter, is an older caſe than any of theſe, the caſe of Robert Lylle, who inſiſted in ſuſpenſion of a capital ſentence of the Sheriff of Renfrew, for theft and houſe-breaking. His allegations were ſtrong, and the Court allowed him to prove them. As they appeared on the proof too, the irregularities could not be accounted trivial: For, beſide leſſer but right numerous errors, akin to thoſe above ſtated, it appeared that three of the

the aſſize, Daviſon, Maxwell, and another, had at different times retired from the Court-room, to places of refreſhment at ſome diſtance from it, and there had intercourſe with ſtrangers; and that two of theſe aſſizers had been abſent, each of them for at leaſt a quarter of an hour. Nevertheleſs, as there was no evidence of any converſation having been held with any of them relative to the trial, nor of any intercourſe with any one who was intereſted in the iſſue of it; and more eſpecially, as it appeared with reſpect to every aſſizer who had retired, that he found the ſame witneſs ſtill under examination on his return, and heard the depoſition cloſed and read over to the witneſs; ſo the Court were of opinion, that, though not inconſiderable, the irregularity was ſtill not of that high degree which called on them to annul the proceedings. They refuſed the bill on the 17th January 1754. After this one, I need not detain the reader with any more teſtimonies of the ſame ſort.

Incloſure of the aſſize. Statute on that head.

III. We are now to follow the aſſize in the laſt and moſt important ſtage of their duty, when they are left by themſelves alone, to deliberate concerning their verdict. How they are to conduct themſelves at this period, has not been left to uſage to determine, but is regulated by the expreſs appointment of the Legiſlature, in the act 1587, c. 92., which is truly a ſecond part or ſequel of the preceding ſtatute, c. 91., on the preamble whereof the enactment now to be recited proceeds, and in connection with which it muſt be taken, to be intelligible to the reader. What it orders, is as follows: "*Item*, It is ſtatute and ordained, That how ſoone the "haill perſute, defences and anſwers thereto, ar fully heard "be the aſſiſe, gif ony of the ſaids aſſiſoures hes ony doubt "quhairof they wald be reſolved, that they propone the ſame

"openly,

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" openly, in preſence of the parties, in face of the judgment,
" before they paſſe out of judgment themſelves. And im-
" mediately after that the ſaid aſſiſe hes choſen their chan-
" cellar, the clerk of the Juſticiary ſall incloſe the ſaid aſ-
" ſiſe them allane, or in an houſe be themſelves, and ſuffer na
" perſon to be preſent with them, or repaire to them in ony
" waies, nather clerke nor uthers, under pretenſe of furder
" information, reſolving of ony doubt, or ony uther cullour
" or occaſion quhatſumever. But that the ſaid houſe be hal-
" den faſt, and na man preſent therein, but the ſaid aſſiſours,
" and that they be not ſuffered to cum out of the ſaid houſe,
" for quhatſumever cauſe, or to continue the giving of their
" ſentence to an uther time; but that they be incloſed as ſaid
" is, unto the time they be fully agreed, and return their
" anſwer be the mouth of the ſaid chancellar to the Judge.
" And our Soveraine Lord, with adviſe foreſaid, decernis,
" declaris and ordainis, That gif ony of the ſaids accuſers,
" informers of his Hienes's Advocate, or uthers perſones
" quhatſumever, pretend in ony wayes in time cuming, to in-
" form, ſolliſt, reaſon, diſpute, ſpeak or repaire to the ſaid aſ-
" ſiſe, *after their* removing foorth of judgment, and incloſing
" of them, in maner abone written; *or utherwayes tranſgreſſe*
" *ony poynt of this preſent act*: In that caſe, the party accuſed
" ſall be halden and pronounced clean and innocent of the
" crimes and treaſons then layed to his charge. And this
" preſent act ſall be ane ſufficient warrand to all aſſiſours in
" criminal cauſes hereafter, to pronounce the party accuſed,
" cleane and innocent, in caſe only of the premiſſes beis con-
" travened."

ACCORDING to what is here related, it appears to have been the practice of thoſe times, that the aſſize made choice of their

their chancellor before incloſing, and in preſence of the Court: But this faſhion was long ago laid aſide, for that which is now obſerved, of performing this, like all the other articles of the peculiar buſineſs of the aſſize, after incloſure only, and by themſelves. We learn too, from the ſtatutory regulations of 1672, that notwithſtanding the injunction of the act 1587, and probably under pretence of aſſiſting the aſſize in point of form, the clerk of Court had been in the uſe of remaining with them when incloſed. This irregularity alſo was corrected in thoſe regulations, which order, "that the clerk of the Court, "nor no other perſon be preſent with the aſſize after they are "incloſed."

Effect of intercourſe with the jury incloſed.

THUS, in theſe ordinances, a plain and invariable rule is laid down for the conduct of the jury at this period. From which if they ſhall ſwerve, by holding intercourſe with any one after being incloſed, the law will preſume, in the ordinary caſe, ſome irregular and partial purpoſe on the part of the accuſer; and will not require, as with reſpect to the period before incloſing, where the prohibition reſts on the common law alone, any ſpecial proof to that effect, toward applying the ſanction of the ſtatute. Accordingly, in the caſe of Sanderſon in July 1739, the ſtatute was applied, and the conviction annulled, becauſe a Sheriff's officer had more than once entered the apartment, and one of the jury had left it, and ſpoken to ſome one without; though there was no evidence of any thing partial or ſuſpicious in the converſation which took place on that occaſion.

Maclaurin, No. 46.

Effect of intercourſe with the jury incloſed.

BUT ſhall it therefore be held, that this is a preſumption *juris et de jure*, not to be overcome by any proof on the proſecutor's part, how clearly ſoever this may ſhow, that the intercourſe

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courſe held with the aſſize was of a quite different deſcription from that which the ſtatute ſuppoſes and means to prevent? If it appear that it was the pannel or his friends who repaired to the aſſize, to ſolicit them in his behalf, certainly it is not to be imagined, that he ſhall be allowed to reap the expected profit of this corrupt enterpriſe, in overturning his own conviction. And as little can he be allowed to complain, if the intercourſe with the jury, though indifferent in itſelf, and nowiſe relative to the trial, ſhall appear however to have been prepared by his contrivance, or that of others who are in concert with him, on purpoſe to ground an objection to the verdict. Farther, I find that on one occaſion at leaſt it was thought a good defence, that the intercourſe in queſtion had been of a neceſſary nature towards doing the buſineſs of the aſſize, and took place only with the officer of Court, appointed to watch over their place of meeting, and keep them incloſed. I allude to the caſe of Kirkpatrick and others, where it was pleaded in arreſt of judgment, and was offered to be proved, that the jury while incloſed held intercourſe with ſome one without. In ſubſtance the anſwer was thus: That the pannel had not ſpecified the nature of this intercourſe, and that he had no relevant plea, if he meant to allege this only, that being left without pens, the aſſize had called for them to one without, who thruſt ſome quills into the apartment for them, under the door. In their reply, the pannels hardly controverted this ſtate of the fact: but they argued that the ſtatute had relieved them from all inquiry on that head; and that, if beſide converſing with the aſſize, any one had thruſt quills into the room to them, it was ſo much the worſe; ſince, for any thing the pannels knew, bills, or banknotes, or other writings, might be concealed in them, or conveyed along with them. In theſe circumſtances, where it ſeemed

Dec. 3. 8. and 15. 1760.

ed tacitly to be allowed that nothing had paſſed but what was indiſpenſable for enabling the jury to return their verdict, the Lords repelled the objection. It would not however be juſt, to draw an inference from this judgment to any caſe of unneceſſary intercourſe, how tranſient and trifling ſoever this may happen to be: For it may eaſily, and always ought to be prevented.

When does the act 1587 begin to operate.

THERE are ſeveral queſtions which fall naturally to be propoſed touching the conſtruction of the foreſaid ſtatute. And firſt, at what period does it begin to operate? Whether as ſoon as the interlocutor is given which adjourns the Court, and orders the jury to incloſe, ſo that they muſt from thenceforward be ſequeſtered; or only from the time of their actually removing out of Court. In other words, is it neceſſary for the aſſize to incloſe, and are they to be held as incloſed, and under the operation of the ſtatute, from the time of ſigning the interlocutor of adjournal: Or is there room for ſome reaſonable interval (for it is clear that there ought not to be a long or unneceſſary one) between that ſtep of proceſs and their actual incloſure; ſo that the act ſhall not be held to be infringed, though ſome minutes are ſpent in clearing the Court-room, collecting the pieces of evidence, and ſending the jury to their chamber; and ſo that the proceedings ſhall not be vitiated here, more than they are in the former period of the trial, although in this interval ſome juryman ſhould caſually retire for an inſtant, or have ſome paſſing and ordinary intercourſe with a byſtander. There ſeems to be nothing in the expreſſions of the ſtatute, to juſtify the former of theſe conſtructions. On the contrary, according to the words of the ſanction or concluſion of the law, it applies only to that ſort of intercourſe with the aſſize, which takes

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place "after their removing forth of judgment, and in-"closing of them in manner above written;" that is, after they have been ſequeſtered, to find their verdict. And in the preceding part of the ſtatute, which gives directions for the incloſure, as little is there any thing ſaid which can reaſonably be conſtrued in any ſtricter ſenſe than this, that the removal and incloſure ſhall take place with all convenient diſpatch, or without undue delay, after the concluſion of the proof and debate. Indeed, ſo far from it, that the act ſuppoſes, nay it ſays, that at this period, between the end of the debate and the incloſure, is the proper ſeaſon for chooſing the chancellor of the aſſize. By the ſame rule, therefore, that time was formerly allowed for that proceeding, according to the faſhion of thoſe days, the jury muſt ſtill have allowance of a reaſonable period to do all thoſe things before incloſure, in the ordinary and natural way, which are requiſite towards their accommodation and incloſing. There is thus no warrant for holding them as incloſed, before they actually are ſo, except in the caſe of ſome immoderate and extraordinary delay, which they are blamable for not avoiding; and more eſpecially they are not to be held as incloſed, though the Court have given their interlocutor of adjournal, while they continue in the preſence of the Judges and the pannel. The reaſon of the thing too is in favour of this conſtruction. For that which the act fears and intends to guard againſt, is the clandeſtine and malicious repairing to the aſſize when they are by themſelves, and out of the eye of the public, and in the immediate act of deliberating on their verdict; not that tranſient, and accidental, and in ſome meaſure public intercourſe, which may happen to take place with ſome of them, while as yet the Judges and the

the byſtanders are not withdrawn, nor the private ſitting of the aſſize begun.

JUDGMENTS are not wanting to confirm me in this, and, perhaps, in even a ſtill more free interpretation of the ſtatute.

Act 1587 applies only after incloſure. Dec. 29. 1703. Jan. 3. 1704.

IN the caſe of Forbes of Barns, and Reid of Bara, three objections were ſtated in arreſt of judgment. 1*ſt*, That the aſſize did not incloſe on the interlocutor of adjournal and huſhing of the houſe, but continued in the Court-room for two hours or thereby, during which they converſed with ſeveral perſons, and ſome of theſe the near connections of the proſecutor, who were alleged even to have ſupped at this time in company with the aſſize. 2*d*, That two jurymen left the Court-room, and were abſent for a while, and did not return till ſent for by their brethren, when about to incloſe. 3*d*, That after incloſing, the aſſize, or ſome of them, had intercourſe relative to the trial, with the proſecutor or his ſon. Now, "the Lords found the *third* article of "the ſaid complaint relevant, as it is libelled, to annul the "verdict;" and they took no notice of the others.

Feb. 19. 1767.

THAT caſe was far ſtronger than either of the two following, in both of which judgment was likewiſe given, repelling the objection. In the caſe of Elizabeth Macnaughton, which was brought by ſuſpenſion from an inferior court, the fact was this: that after the order to incloſe, the jury remained in Court for the ſpace of ten minutes, or a quarter of an hour, collecting their notes, and the proceedings in the trial, and procuring the neceſſary articles for their private ſitting; and that ſome tranſient converſation took place with ſome of them, as they were paſſing through the audience, to incloſe.

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Aug. 2. 5. and 11. 1785.

In the caſe of William Mills, the objection reſted on a ſtill more ſlender piece of irregularity. After the clerk of Court had read out the interlocutor ordaining to incloſe, one juryman left the Court unattended, and had got a few ſteps beyond the threſhold of the Court-houſe, when he was met by ſome one, who told him that he did wrong in being there; whereupon he inſtantly returned, and was in Court ſoon enough to hear the clerk call over the names of the whole aſſize, and to anſwer for himſelf, before incloſing. This caſe was very deliberately conſidered, and the objection was repelled.

Caſes of delay to incloſe.

I must not omit to lay two inſtances more before the ſtudent, in which, by order of the Court themſelves, there took place a ſtill greater delay to incloſe, than in any of the above-mentioned caſes. I allude to two of the many trials which took place at Cupar, in 1720, on occaſion of the frequent riots, owing to the dearth of grain in that quarter of the country. James Duncan, and others, were empanneled for

May 25. and 26. 1720.

a riot at the mill of Stravithie; and after concluſion of the proof on both parts, an interlocutor was given, ordaining the aſſize to incloſe, not immediately, according to the ordinary ſtyle, but only at the riſing of the Court. Meanwhile, the ſame aſſize are empanneled anew, on William Paton and others, for quite a ſeparate act of riot; and after hearing the proof and debate in this trial alſo, they incloſe *ſimul et ſemel* on the two caſes, and return their verdicts in them, together. The very ſame courſe is taken in the trial of the two indict-

May 27. 1720.

ments of David Barrie and others, and James Grant and others, for facts of the like kind; and this, in all theſe inſtances, without any objection being ſtirred, or the conſent of the pannel being aſked, to ſo unuſual a proceeding. So far, indeed, the thing was not exceptionable, as, until incloſing, the

the aſſize were kept in the conſtant and immediate preſence of the Court, and without opportunity therefore of any ſuſpicious intercourſe with others. Yet ſtill, there ſeems to be ſome difficulty of reconciling this long and voluntary delay, and ſtill more the handling of a new trial reſpecting facts in ſome meaſure related to thoſe in the firſt one, with the tenor and ſtrain, I might almoſt ſay the injunction, of the ſtatute, which plainly imply that the removal out of judgment ſhall take place without undue delay, on the termination of the proof and debate.

Act applies till the verdict be finiſhed.

2. With reſpect to the continuance of this incloſure, the direction of the ſtatute is, "That they be incloſed, as ſaid "is, unto the time they be fully agreed, and return their "anſwere be the mouth of the ſaid chancellar to the Judge." The meaning of this paſſage is not underſtood to be, that the aſſize ſhall ſtraightway re-enter the Court from their ſtate of incloſure, and cannot ſeparate till the Judge take the verdict off their hands; but that they ſhall remain incloſed until they finally ſettle their verdict, and ſee it reduced to writing, and authenticated with the hands of their chancellor and clerk. For when this has been done, the aſſize have made their anſwer in the eſtimation of law, by the mouth of their chancellor, to the judge, and they can no longer vary nor retract it. But until their determination be reduced to this formal and unalterable ſhape, though the votes have been called and the reſult announced, it ſeems not to be clear at leaſt, that the reaſons for preventing intercourſe with them are in anywiſe removed. The very form and words of the written verdict, may often be matter of intereſting debate and difference of opinion; not to mention that there ſeems to be nothing to hinder an aſſize from voting a ſecond time, or an aſſizer from altering his

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his opinion, as long as the ſeal of writing has not paſt on their firſt deciſion. Beſides, it is better not to liſten to nice diſtinctions in a matter of this ſort, where a broad and plain rule is ſo eaſy to be obſerved, and is attended at leaſt with one ſubſtantial advantage, that of preventing all ſuſpicion of influence or irregularity. On this head, I have, however, the authority of one judgment againſt me. At returning the verdict in the caſe of Harry Gordon, it was objected, that two of the aſſize had left the room, and had intercourſe with perſons without; and that after being reproved by the macers for their abſence, they had been remanded into a ſtate of incloſure, in which the aſſize continued for the ſpace of half an hour or thereby, until the verdict was written and ſealed. But this notwithſtanding, the verdict was ſuſtained, (though the interlocutor [1] is awkwardly expreſſed), becauſe theſe things were not alleged to have happened, until the chancellor of aſſize had called and marked the votes, and had verbally intimated the reſult.

Feb. 26. 1672.

Way of proving the fact, and applying the ſtatute.

3. One inquiry more concerning this ſort of miſdemeanor, relates to the way of proving it, and the authority which ſhall have cogniſance of its effects. On which head the ſtatute ſays: "And this preſent act ſhall be a ſufficient warrant to "all aſſizes in criminal cauſes hereafter, to pronounce the "party accuſed clear and innocent in caſe any of the pre-"miſes is contravened." Thus far is therefore clear, that the

1 "Having conſidered the foreſaid debate, repells the alledgiance, in reſpect "of the reply, unleſs the pannel would alledge in thir terms, viz. that ſome of "the members of inqueſt came out before the votes were concludit, and after "gathering thereof, the chancellor had verbally intimate the ſame to the aſſiſe, "albeit the verdict was not formallie redacted *in ſcriptis*, and ſubſcrived."

the aſſize themſelves, in caſe of ſuch an attempt againſt them, are entitled to vindicate their own honour, and apply the law, by immediately finding a verdict for the pannel. But ſuppoſing, as may happen, that the aſſize miſunderſtand, or are not diſpoſed to uſe their privilege in this reſpect, is it to be held that the caſe is therefore without a remedy, and that the conviction is altered in this way from bad to good, through the error, or at the diſcretion of the aſſize? In his obſervations on this ſtatute, Mackenzie ſeems to ſay, that ſuch ſhall be the conſequence of their omiſſion. "It may "be alſo doubted (ſays he) whether ſuch verdicts can be re- "duceable, for though the act declare that the aſſizers may "aſſoilzie if any ſpeak to them, yet if they and the Juſtices "proceed, it ſeems not quarrellable, at leaſt before the Seſ- "ſion." But this ſentiment is liable to the invincible objection, of denying the pannel all benefit of the law in thoſe ſituations, the very ſituations which moſt require it, where the aſſize themſelves have participated of the corrupt diſpoſition, and have readily admitted, or perhaps have courted the proſecutor's intercourſe and ſolicitation. Mackenzie's words are, however, not preciſe, and perhaps I have not conſtrued them rightly.

P. 254.

Way of applying the act.

WITH regard, however, to the method of proceeding on an objection of this ſort, the Court ſeem at one time to have inclined to an opinion, which ſubſtantially made the aſſize Judges of their own behaviour, and placed the law entirely in their hands. For in the caſe already mentioned of Harry Gordon, the interlocutor was thus: "And the Lords finds "that they themſelfs are Judges to the *relevancie* of the ſaid "alledgeance, and the *probatione* ought to be led before "them, and thereafter to be remitted to the *ſame aſſize*, who "are to incloſe and returne their verdict thereanent," thus putting

Feb. 26. 1672.

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putting it in the power of the aſſize to diſſemble their own miſconduct, or that of others with reſpect to them, if they choſe. In all later inſtances, the Court have juſtly abandoned this ineffectual courſe of inquiry, and have decided on the proof themſelves. It muſt however happen on moſt occaſions of this ſort, that the perſons of aſſize, or ſome of them, are neceſſary witneſſes to eſtabliſh the fact. Moreover, if it ſhall appear that the aſſize themſelves, or any of them, have been blamable on the occaſion, the Court have power, though not expreſsly given them in the act, but as in the caſe of any other wilful irregularity, to inflict a ſuitable cenſure, and it may be a ſevere one, on thoſe delinquents; as they alſo may on all others who are concerned in the miſdemeanor. With this view, in the caſe of Reid of Bara above mentioned, they ordered Sir Alexander Brand, the faulty aſſizer, to give bond under a penalty for his appearance when he ſhould be called on; but as far as I have obſerved, nothing farther enſued.

Verdict made up without incloſure, is null.

After all that has been ſaid on theſe points, it is unneceſſary almoſt to add, that in no caſe ſhall a verdict be good with us, which is made up in open Court, or without incloſing the aſſize: For if the ſtatute give preciſe inſtructions with regard to their conduct after incloſing, it is no leſs poſitive in ordering that they ſhall be incloſed, on the concluſion of the proof and debate. In truth, it ſo happened in one inſtance, that owing to the neglect of this precaution, a conviction was overturned, or, at leaſt, a ſtop put to the execution of the ſentence. In ſpring 1777, William Wood was brought to trial at Jedburgh, for theft, and he pleaded guilty to the charge. But, by a ſtrange overſight in all concerned, inſtead of incloſing to return their verdict, the aſſize continued their ſitting in open

open Court, and in preſence not only of the byſtanders, but of the Judge, and the proſecutor alſo. They were ſaid even to have converſed with the Judge reſpecting the choice of their chancellor; and after drawing out, and before ſigning their verdict, they had handed it to the Advocate-depute, for his inſpection. There was thus a plain violation of the ſtatute 1587, both in the omiſſion to incloſe, and in the intercourſe which was held with the accuſer: For that the pannel had confeſſed, could make no ſort of difference in the caſe. Sentence of tranſportation paſſed, however, on the verdict. But in the end, this extraordinary blunder proved the means of ſaving the man from the natural conſequences of his confeſſion. For, after trial of relief in the way of a ſuſpenſion of the ſentence, which was neceſſarily refuſed as incompetent, he, on due repreſentation of theſe circumſtances attending his conviction, obtained a free pardon from the Crown.

Feb. 4. 1777.

WE have now ſeen, what are the conſequences of any attempt to influence or communicate with the jury, on the part of the proſecutor or his connections. But what does the law pronounce in caſe of the like attempt on the part of the pannel, his aſſociates or favourers? It is plain, that on this head we have no benefit of the ſtatute 1587, whereof the whole contents, and more eſpecially the ſanction, are applicable only to the caſe which in thoſe times was more neceſſary to be provided for, that of unfair practices being employed againſt the pannel, to procure his condemnation. And as to the common law, I know not whether it can be affirmed, that it will go the length of overturning an acquittal obtained in this way, if the verdict has once been received and entered on record. For the proſecutor may and ought to be inform-

What if the pannel's friends have intercourſe with the aſſize.

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ed of ſuch incidents, which take place in a manner judicially, by the time appointed for returning the verdict. And it muſt be remembered, that while aſſizes of error were in uſe, which proceeded on the notion of wilful and corrupt partiality in the aſſize, ſtill it was the expreſs appointment of the law, that the verdict ſhould ſtand faſt, at the ſame time that the perjured aſſizers ſhould meet with the due chaſtiſement of their wrong.

See ſtatute 1475, c. 63.

FROM this, however, ſuppoſing it to be law, it in nowiſe follows, that the proſecutor having in due time informed himſelf, may not effectually ſtate ſuch ſolicitation or intercourſe on the part of the pannel, as a reaſon why the verdict ſhould not be received. Of its own nature, ſuch an occurrence ſeems to be a good cauſe for diſcharging the aſſize, and beginning the trial anew: In pleading it to this effect, the proſecutor takes his chance of what the verdict may happen to be; and the pannel cannot appeal to the maxim of not tholing an aſſize twice, both becauſe he is injured only by his own act, and becauſe he has not yet an acquittal on record to produce. But this is a point which has never yet occurred in practice; and I will not therefore purſue the queſtion any farther, how much ſoever the occaſion may invite me.

Form of returning the verdict.

IV. To paſs to the laſt article of the duty of the aſſize, the returning of their verdict into Court. For this purpoſe an hour is appointed by ordinary, ſtyle of the interlocutor ordaining them to incloſe [1]; though, if they be ſtill ſitting when that hour comes, the Court may adjourn anew, and appoint

[1] This is a piece of modern ſtyle, and does not appear in the older books of Adjournal.

point them another hour. In the ordinary caſe, the verdict can be received in the preſence only of the pannel: For, as mentioned formerly, if even at this period of the proceſs he make his eſcape, or withdraw his appearance, no farther ſtep can be taken in the trial, but ſentence of fugitation only be pronounced, in like manner as if he never had appeared at all. Like other rules, this one may however be departed from in extraordinary circumſtances, where, without injuſtice, or great inconvenience, it could not be obſerved. And ſuch a ſituation occurred in the trial of Peter Glaſgow, and others, in October 1797, for riot. It happened here, that Glaſgow was taken ill while the aſſize were incloſed, and became unable to attend at the appointed hour for receiving the verdict from their hands. Nevertheleſs, as others were under trial on the ſame indictment, it was held that theſe had a right to know their fate, and could not on his account be ſubjected to farther anxiety or confinement. The verdict was received therefore in abſence of Glaſgow; and he had ſentence afterwards, in purſuance of his conviction.

Oct. 10. and 12. 1797.

Whole aſſize preſent at returning verdict.

It is equally true, that in the ordinary caſe, the verdict can be received in the preſence only of all the perſons of aſſize. And the reaſon is, that they may, in open Court, hear the verdict read out from the record, and there own and acknowledge it as the very verdict which they have found, and have committed to the keeping of their chancellor, to be delivered by him, as their act and deciſion to the Bench. For, as the writing is authenticated with the names only of the chancellor and clerk, it would otherwiſe be in the power of theſe two perſons, in concert with each other, to ſuppreſs the true verdict, and ſubſtitute another in its place. As long therefore as the perſons of aſſize are all ſurviving, and able to attend,

CHAP. XVI.

the Court will not readily receive the verdict in the abſence of any of them; but will rather adjourn that buſineſs to another time, and take order for compelling the obedience of him who is refractory, or negligent of his duty. Such an adjournment ſeems to have taken place in the trial of Alexander Cunningham for fire-raiſing. But, like the former, this rule is ſuitable only to the ordinary caſe, and is not obſerved ſo much for neceſſity, as out of ſcrupulouſneſs, and becauſe in ſuch matters the law is deſirous of having the beſt and moſt ſolemn evidence, if it can eaſily be obtained. It is not therefore to be imagined, that the verdict is loſt, if one or more of the aſſize, or even the chancellor himſelf, happen to die, in the interval before the hour appointed for returning it. Nay, if any of them be taken with a long and ſevere illneſs, ſuch as diſables him to attend, it ſeems probable that here too, on account of the pannel, who ought not to be kept in ſuſpenſe, and has right to his immediate freedom in caſe of acquittal, the verdict ſhall be received in the preſence, and under the faith and teſtimony of the other perſons of aſſize.

July 31. 1677.

Form of returning verdict into Court.

THE names of the inqueſt being called over in preſence of the Court, they are aſked concerning their chancellor, Which of them he is; and from his hands the verdict is received by the preſiding Judge; who having unſealed and peruſed it, delivers it to the clerk of Court, to be by him transferred into the record; after which, and a careful compariſon of the record and original writing, which takes place under the eye of the Court, it is announced and read out aloud.

Sealing up of the verdict.

The verdict is then ſealed up, in compliance with the regulations of 1672 (No. 9.), which declare that it ſhall never again be opened, but by order of the Judge; and that if the clerk

clerk infringe this prohibition, he ſhall be puniſhed with the loſs of his office, and otherwiſe, at the diſcretion of the Court. At that time, as appears from the way in which this article is introduced in the ſtatute 1672, it was the main object of this order, to prevent any alteration by the clerk or others, of thoſe marks which were then ſubjoined to the names of the ſeveral aſſizers, for ſignifying how they voted, and which ſerved as a direction whom to arraign, in caſe of a proſecution for wilful error on aſſize. Though not at firſt intended, this practice ſerves however the far more uſeful purpoſe, of hindering all alteration of either the ſubſtance or the form of the verdict, on the part of the clerk or others, whereon to found a plea of diſconformity of the record and verdict. If any queſtion of this ſort ſhall ariſe, the verdict having remained ſealed all the while, and in the cuſtody of the Court, will, on being opened in their preſence, ſtand free from all ſuſpicion, and teſtify for itſelf. In the trial of Alexander Blair and others, by an aſſize of error, on the 25th July 1681, the Lords "ordained the verdict of aſſyſe againſt the nyne perſons aſſoilzied to be oppined and broke up, and given in to the great aſſyſe, as a mean of probation." The verdict was opened and compared with the record, and again ſealed up, in the caſe of Gabriel Cunningham, who inſiſted in ſuſpenſion of a capital ſentence, pronounced in an inferior court. The like reviſion ſeems to have taken place in the caſe of Livingſton; where the verdict was remitted for conſideration, by the Judges who had received it on a Circuit. In the caſe alſo of Hog and Soutar, on a motion for the pannels, "that there was ſome variation in engroſſing the verdict of aſſize in the record from the principal verdict," order was given to unſeal and compare it; and, being found right, it was again ſealed up.

July 28. 1730.

Maclaurin, No. 55.

July 24. 1738.

IN

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What if the aſſize impeach the verdict as falſe.

In the form above deſcribed, a verdict is lawfully returned, owned, and confirmed in Court. But what ſhall be done, if inſtead of acknowledging it as their verdict, the jurors or a part of them, on hearing it read, ſhall riſe up to falſify and impeach it? The falſehood of a verdict may be of two ſorts. If the aſſize, all but the chancellor and clerk, affirm that the writing now given in as their verdict is not a true deed; is not *the writing* made up and ſigned by their clerk and chancellor in their preſence, and by their appointment, but a private and ſpurious work of thoſe two perſons themſelves, who have withdrawn or deſtroyed the true verdict, and have ſubſtituted their own private handiwork in its ſtead; there ſeems to be little doubt of either the competency or the relevancy of this objection. For, to give an opportunity of ſuch a challenge, is, as I have ſaid, one at leaſt of the chief reaſons for requiring the attendance of the aſſize on this occaſion. The proof of ſuch a thing, can hardly be otherwiſe than by examination of the perſons of aſſize themſelves.

What if they challenge it as irregularly obtained.

But it is quite a different ſort of challenge, and one which is ſubject to difficulties of ſome weight, whether a part of the jury, while they allow that the writing now produced is the very writing made up in their preſence, can yet be ſuffered to allege that it ſhall not be received for their verdict, becauſe it was improperly obtained; becauſe the queſtion was not duly put, or the voices were not fairly counted, or becauſe ſome of the aſſizers miſunderſtood the ſtate of the vote; or becauſe unlawful means of threats, importunity, or the like, were uſed by ſome of the aſſize with the others, to obtain their aſſent. If a plea of this ſort in impeachment of the ſubſtance of a verdict, can at all be liſtened to, one thing at leaſt ſeems to be clear, that it can only be in thoſe caſes, comparatively but few in number, where the

the jury re-enter the Court ſtraightway on breaking up their private ſitting. For if they diſperſe, and diſcloſe their verdict, (as ſometimes happens), then are they expoſed to all thoſe temptations, from the opinions and commentaries of the world on their deciſion, which it is the very object of our law to guard againſt in ordering them to be incloſed, and which may poſſibly prevail with them to diſavow and challenge their genuine verdict, on falſe and affected grounds. Nay, though they conceal even, as they ought to do, the reſult of their deliberations, yet ſtill they learn the opinion of others concerning the caſe and the evidence, and are liable, leſs or more, to be influenced by what they thus hear paſſing in the world on that ſubject.

What if they challenge it as irregularly obtained.

But farther; even in the oppoſite caſe, of the aſſize returning ſtraightway into Court, there ſeems ſtill to be ſome doubt of allowing any impeachment of the written verdict, on the ground of irregularity in their proceedings or deliberations while they were incloſed. To withſtand and control any attempt towards influence, conſtraint or partiality, on the part of their own members, this was both the duty of the aſſize, and within their power; and rather, if there were no other remedy for it, to continue incloſed till the meeting of the Court, and then diſſolve their ſederunt and ſtate the reaſon to the Judge (though the whole proceedings ſhould be invalidated thereby), than to acquieſce in a plain uſurpation and injuſtice. If, therefore, they have wittingly allowed the verdict to be made up in their preſence, ſuch as it is, they have thereby given their deliberate and moſt ſolemn teſtimony, as if under their own hands, and ſuch as they can never be allowed to gainſay, to the truth of this report, and to the lawfulneſs and regularity of all their previous proceedings with a view to it. It is obvious that any other rule would lead to hurtful, and indeed interminable

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interminable inquiries. A queſtion of this ſort occurred in the trial of Janet Nicol, who challenged her conviction on this ground, that the verdict was truly in her favour, if the votes of the aſſizers had been fairly counted. But the Lords found, and this was an undoubted ground of judgment, that ſuch a plea could not be liſtened to in that inſtance; as the verdict had been received and recorded in preſence of all the aſſize, without any objection being moved at the time.

Challenge of the verdict as falſe through error.

THERE is a third, and a ſtill more nice, but a very improbable ſituation of impeachment, in which a verdict may happen to be. This is, where it is challenged as falſe through error; as if by pure inadvertency of the clerk and all concerned, a material word, ſuch as the word *not*, is omitted, or is inſerted, before the word *guilty*. Such an objection is of quite a different ſtamp from the laſt, which allows that a writing was knowingly returned in the terms that have paſſed on record, and challenges the previous proceedings only, by which it was procured; whereas the plea here is, that in truth no ſuch writing as is now produced for the verdict of aſſize, ever received their aſſent at all. If, therefore, on anouncing the verdict in Court, all the perſons of aſſize agree in teſtifying to this effect (for I think they cannot be liſtened to, if there be one diſſenting voice among them), it may ſeem difficult not to give effect to their unanimous declaration, concerning a matter which is known only to themſelves. Yet ſtill, on the other hand, how ſhall it be reconciled with our cuſtom, which requires a written verdict, or with our ſtatutes, which forbid all intercourſe with the aſſize till their anſwer be finally agreed on, thus to ſuſtain what is ſubſtantially a verbal verdict, and one which is returned too in the very act of communication with the Court? Beſides, is it not the duty

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of the aſſize to be ſatisfied with their own eyes, of the correctneſs of their verdict; and muſt they not be held to have made ſuch a reviſal, before they authoriſe their chancellor and clerk to ſubſcribe it in their name? And if they have diſperſed, or had intercourſe with others, after breaking up their *ſederunt*, may not this challenge of their verdict be the fruit of importunity, or fear, or repentance, urging them to recall and overturn what they had truly found? Certainly there are difficulties here on both ſides. But ſuppoſing thoſe which I have laſt ſtated not to be unſurmountable, yet one thing ſeems likely, that the moſt favourable reſult to the pannel in ſuch a caſe can only be to have the proceedings ſet aſide, and way made for a new trial, and not to procure an alteration or rectification of the verdict on record. But I have now ventured too far out of the proper circle of our inquiries.

Not lawful to reincloſe the aſſize.

To return to the ſtate of practice. One thing is now matter of uniform obſervance, indeed it is a neceſſary conſequence of the ſtatute 1587, c. 92., that the deciſion of the aſſize is tranſmitted to the Court through the medium of the written verdict alone. Wherein if there be any thing obſcure, or defective, or even contradictory or unintelligible, this cannot be explained, ſupplied, or amended by the aſſize in Court, on the queſtion or ſuggeſtion of the Judge; neither can the Judge remand them into a ſtate of incloſure, privately to reconſider and correct their verdict, for themſelves. It muſt be taken from them as it is, and receive the judgment of the Court, with all its imperfections, how groſs ſoever theſe may be, and without regard to the prejudicial conſequences, which may ſometimes attend ſuch an iſſue of the trial. It is true, inſtances are to be found of the infringement of

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this rule. Such as that which which is recorded by Fountainhall, in the trial of James Learmonth; where, as that Judge relates it, the aſſize were repeatedly reincloſed, till they found againſt the pannel. Such alſo as that in the caſe of Marion Weir, reported by the ſame Judge, where the aſſize, "after they had been abroad all night, were the next day, "by command of the Criminal Lords, and inſtigation of "the King's Advocate, reincloſed to mend their verdict." As far as I can judge from the record, though expreſſed ſomewhat obſcurely [1], the like had happened in the trial of Alexander Blair and others, convicted of wilful error as jurymen in a trial for treaſon. It was objected, that no ſentence could paſs againſt the pannels, "in reſpect there was a former "verdict, and the doors oppined, and the ſamin brock up, "upon which Mr Thomas Skene as procurator for the pannalls, "took inſtruments." The record does not ſay that any anſwer was made to this challenge; nor is any notice taken of it in the doom which paſſed on the verdict. Let me mention too, that at an advanced period [2] even of the preſent century,

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[1] Mackenzie in his Obſervations on the ſtat. 1587, c. 92. (p. 254), gives a different account of this objection from that which appears in the record; as if there had been no former verdict, but only an intercourſe with the aſſize; but it "is fit to add (ſays he), that *Blair*, and others, being convict of error, for aſſoil-"zieing ſome traitors wrongouſly, and their eſcheats being gifted, they raiſed a "reduction of the gift as founded upon a verdict that was null by this act, in ſo "far as the King's Advocat had ſpoke with the aſſyzers after they were inclo-"ſed, which reaſon was repelled, becauſe the Juſtices had declared, that the Ad-"vocat had only ſpoke to the aſſyzers in their preſence, when the aſſyzers were "deſiring to be ſolved of ſome doubts, which was ordinary and allowable; *De-"cember* 21. 1682."

[2] Mackenzie, ſpeaking of the caſe of Binning, who was convicted of forgery, (July 3. 1662), ſays, that the jury were reincloſed, and altered their verdict. This, however, does not appear in the record.

a verdict ſeems to have been ſuſtained by the Lords, notwithſtanding an irregularity of this ſort. I allude to the ſuſpenſion, purſued by Gabriel Cunningham, of a capital ſentence of the regality court of Glaſgow. One of this man's allegations was, (but it was mentioned in paſſing only, and was not inſiſted on as a reaſon of ſuſpenſion), that, having made up their verdict, the jury ſeparated for the night, and next day returned it into Court; and that after a haſty and not very audible reading (as was ſaid) they reincloſed by order of the Judge, Mr Orr, and again found a verdict, to the ſame or nearly the ſame purpoſe. On the 7th of November 1730, "the ſaid Tho- "mas Orr being called to the bar, the Court took notice, that "he had failed much in his duty, in ſuppreſſing or refuſing to "allow the *firſt verdict* returned againſt the ſaid Gabriel Cun- "ningham to be openly read in Court, which was the pan- "nel's right, and the right of every ſubject; and that he pro- "nounced ſentence of death againſt Cunningham upon the "*ſecond verdict*, although the facts libelled were found con- "junctly relevant, and that the jury had found one of theſe "facts not proven; therefore the Lords recommended to the "Lord Juſtice-Clerk to rebuke the ſaid Thomas Orr for theſe "proceedings; and he was accordingly rebuked in open "Court," &c. Yet the Lords had previouſly ſuſtained this verdict as warrant for ſentence of tranſportation. Notwithſtanding this precedent, I ſtill cannot help entertaining an opinion, that where the final and only verdict which paſſes on record, is pronounced after re-entry into Court, the regular conſequence is the full abſolvitor of the pannel, as for an infringement of the ſtatute 1587.

Aug. 13. and 25. 1730.

Assize cannot be reincloſed.

It is true, that in reporting the ſaid caſe of Marion Weir, Lord Fountainhall ſeems inclined to diſtinguiſh on this head,

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Notes, *ad p.* 254.

according as the aſſize have or have not diſperſed, at the cloſe of their firſt ſitting. Lord Royſton too, expreſſes himſelf ſomewhat to the ſame effect: And notice may be taken alſo, of the authority of at leaſt one deciſion, where this doctrine ſeems to be right plainly delivered. I allude to the

July 30. 1677.

trial of Alexander Cunningham for fire-raiſing, where the interlocutor was as follows: "The Lords, &c. having con-"ſidered the verdict of aſſyſe returned upon the ſaid Alex-"ander Cunningham, that the ſame is *not clear* in ſua far as "they find him guiltie of the preſumptions, and have not "fund him guiltie of wilful fyre-raiſing conforme to the "dittay and interlocutor remitting the ſame to them; and "that when the verdict was firſt offered, all the aſſyſers were "not preſent, ſome of them having immediatelie on diſcloſing "gone out of town, and three days having thereafter paſt be-"fore they came to be all preſent at the giving in of the "verdict, *ſo that there has bein occaſion for the aſſizers to meet and "ſpeak with the perſewars and defenders, or ſome perſons from them, "doe therefore find that they cannot again incloſe the aſſize:* But "conſidering the verdict as it ſtands, with the petition given "in be the pannel offering himſelf to baniſhment, they there-"for, by the mouth of Adam Auld, &c. dempſter of Court, "decerned and adjudged the ſaid Alexander Cunningham to "be baniſhed," &c. But truly, for my own part, I find great difficulty of reconciling a reincloſure of the aſſize, in any caſe, with the injunction of the ſtat. 1587, c. 92., which does not diſtinguiſh between communication with the Judges, and with others[1]; and ſpecially directs the aſſize, if they have any doubt of which

[1] "It is ſtatute and ordained, that how ſoone the haill perſute, defenſes, and "anſwers thereto, ar fully heard be the aſſiſe, gif ony of the ſaids aſſiſſoures hes "ony

which they would be reſolved, to propoſe it openly, before incloſing or removing forth of judgment; and forbids them to be removed from their ſtate of cuſtody, till they be finally agreed on their anſwer: whereas, if they be reincloſed, their final anſwer is not given until after the diſſolution of their ſitting, and a conference with the Court concerning their deciſion, and under the influence of the ſentiments, inſtructions, and perhaps cenſures, which have been thrown out on that occaſion. It is true, this conference takes place under the public eye; but then, it for certain has relation to the trial, which may not always be the caſe as to intercourſe with the jury while incloſed: and if it were no more than this, it is an objection, according to the ſpirit of the ſtatute 1587, that the aſſize are witneſſes of the reception, whether favourable or otherwiſe, which their verdict meets with from the audience, and the Court.

V. THESE things exhauſt what ſeems chiefly to be obſervable as to the manner of returning the verdict into Court. But we have ſtill to inquire concerning thoſe qualities, which muſt meet in the verdict itſelf, to make it a good conviction, or

" ony doubt quhairof they wald be reſolved, that they propone the ſame openly,
" in preſence of the parties, in face of the judgement before they paſſe out them-
" ſelves; and immediately after that the ſaid aſſiſe hes choſen their chancellar, the
" clerk of Juſticiary ſal incloſe the ſaid aſſize them allane, or in an houſe be them-
" ſelves, and ſuffer na perſon to be preſent with them, or repaire them in ony waies,
" nather clerk nor uthers, under pretenſe of furder information, reſolving of ony
" doubt, or ony uther cullour, or occaſion quhatſumever; but that the ſaid houſe
" be halden faſt, and na man preſent therein but the ſaid aſſiſoures, and that they
" be not ſuffered to come out of the ſaid houſe, for quhatſumever cauſe, or to
" continue the giving of their ſentence to anuther time; but that they be inclo-
" ſed as ſaid is. *unto the time they be fully agreed*, and return their anſwer be the
" mouth of the ſaid chancellar to the Judge."

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or lawful ground of ſentence againſt the pannel. Of theſe, ſome relate to the form of the verdict, and others, to the *finding* or ſubſtance.

Form of the verdict. Aſſize marked.

It has already been mentioned, that the form muſt be a written form [1]. Wherein the firſt thing that is marked, is the *ſederunt*, or the names of the perſons of aſſize; which ſerves the double purpoſe of vouching that they were fully met, and of applying the verdict to the particular caſe or trial. Formerly, this was needful for a third reaſon; in order that each man's vote might be ſubjoined to his name, whereby to diſtinguiſh the perſons who might be liable to trial for wilful error on aſſize: In which view, the regulations of 1672, particularly ordered the chancellor of aſſize to attend to that matter [2].

If

[1] From the expreſſions of the old ſtyle of verdict, one might be led to conjecture at firſt ſight (but this is far from being fit to be truſted to) that the faſhion had once been to return the verdict *vivâ voce*, by the mouth of the chancellor of the aſſize. The record of conviction of Laurence, Lord Oliphant, for murder, (MS. Abſtract, in Advocates' Library, Dec. 20. 1580), ſays, that the aſſize, "by their deliverance pronouncit and declairit *by the mouth and ſpeaking* of "George Symmer of Balordie, chancellor, fand," &c. In the trial of James Mitchel, (March 1. 1675), the verdict proceeds thus: "*Be the mouth of John* "*Sydſerf, their chancelar*, elected and choiſen be them, and they all in one voice "by their ſaid chancelar, have found," &c. In the firſt part of laſt century, the ſtyle of the record is very frequently, or rather ordinarily thus, relating that the perſons of aſſize "returnit again into Court, where they all in one voice, or by "plurality of voices, by the report and declaration of the ſaid chancellor, fand "and pronouncit, and declarit," &c.

[2] In the caſe of Samuel Mathews, (which did not come to any deciſion), exception was neverthelefs taken to a verdict for the want of this marking of the votes; but the thing itſelf, as utterly uſeleſs, had even then been long diſcontinued. September 12. 1721.

If therefore the ſederunt of aſſize, as thus ſet down, anywiſe varies from the record, by the omiſſion of a name, or the inſertion of a wrong one, this affords room to object, that the aſſize have not been fully aſſembled, or that they did not conſiſt of the ſame perſons whom the Court appointed to this ſervice; either of which irregularities would be fatal to the verdict. But if, on the moving of any ſuch challenge, the aſſize being in Court, and not yet diſcharged of their office, ſhall be unanimous in teſtifying that their full number, and none but the proper perſons were preſent, and that the error lies only in the marking of the ſederunt; there is no good reaſon why in a matter of this ſort, which does not relate to the ſubſtance but the form only of the verdict, and to facts of a public and unchangeable nature, it ſhould not be competent to rectify the writing according to the truth. Corrections of this ſort have accordingly been allowed on more than one occaſion. In the trial, for inſtance, of Iſobel Kilgour, in July 1754, where one juryman was erroneouſly deſigned in the ſederunt, and the name of another was omitted. In the trial alſo of John Kirkpatrick, where the name of one juryman had been omitted, and that of another twice inſerted. And again, in the caſe of William Carſewell, which was judged on report from the Judges on a Circuit, leave was given to ſupply the omiſſion of the name of one of the aſſize [1]. And here I may mention, that the like doctrine is applicable equally to other errors of the like formal and unſubſtantial ſort. Such as that which happened in the verdict returned againſt David Mitchel,

Maclaurin, No. 64.

Dec. 3. 8. and 15. 1760.

May 30. June 9. 1791.

July 14. 1791.

[1] "The ſaid Lords repel the objection pleaded in bar of judgment; and in re-"ſpect of the ſaid verdict, and what is before repreſented on the part of the pro-"ſecutor, they, in terms of an act," &c. He was tranſported on the Lord Advocate's repreſentation, that he did not inſiſt for a capital puniſhment.

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Mitchel, where, in relating the election of the chancellor of aſſize, the words "to be their chancellor," were wanting, after the name of the perſon who was choſen to that office.

Form of the verdict. Choice of chancellor and clerk.

THE firſt part of the verdict relates to that election, and is expreſſed in theſe or the like terms: "The above aſſize having incloſed, made choice of the ſaid A. B. to be their "chancellor, and the ſaid C. D. to be their clerk." As far as I have obſerved, this act of the aſſize was always in uſe to be ſet forth; for the chancellor was *the mouth* and organ, and ſo the verdict often expreſſed it, through which the aſſize communicated with the Court. The election of the clerk did not become a conſtant part of the ſtyle, though it was occaſionally introduced, till ſome time after the inſtitution of the preſent Supreme Court.

Form of the verdict. Preamble.

IN the next part of the preamble, a narrative is given of the charge on which the jury are empanneled, and of the proceedings which they have conſidered, towards the finding of their verdict: "And having conſidered the criminal libel "raiſed and purſued at inſtance of his Majeſty's Advocate, "for his Majeſty's intereſt, (or as the caſe happens to be), "againſt A. B. pannel, interlocutor of relevancy pronounced "thereon by the Court, the evidence adduced in proof of "the libel, and evidence in exculpation, (where ſuch there "is), they find," &c.

BUT how far this fulneſs and detail, though it has now been uſed for ſome years, is in itſelf eſſential to the verdict, may ſeem to be very doubtful. This ample and verboſe ſtyle, is of modern introduction; for, till near the end of the laſt century, nothing was more ordinary, than for the aſſize to

to make their return without any ſort of preamble, and in the ſhorteſt and moſt ſummary faſhion: and yet, in my mind, the buſineſs was as well done, as under the more anxious form which has been uſed in later times. There is a verdict in theſe words, on the 26th January 1675: "The aſſize all in "on voice find William, and Samuel, and George Barries "guiltie of the murder of umquhile Thomas Dunlop in the "maner contained in the indyctment and confeſſions: Sub- "ſcrived be me as be the order of the jurie, and ſealed, "JAMES GLEN, chancellor." And this is the verdict in the caſe of George Craw: "The aſſyſers having elected and choi- Nov. 21. 1676. "ſen James Arbuckle chancelar of the aſſyſe, they all in on "voice find Robert Crawe pannall guiltie of deforceing the "meſſenger." So too, on the 8th January 1677, in the trial of Margaret Buxtoun and others, the record relates that the aſſize "being incloſed, and having reaſoned and voited upon "the points and articles of the dittay, and probation adduced, "they returned their verdict in preſence of the ſaids Lords, "*whereof the tenor followes:* John Herries chancelar, out of the "mouth of the inqueiſt, finds the pannalls not guiltie, con- "forme to the three depoſitions: *ſic ſubſcribitur.* Jo. HERRIES, "chancellor." Theſe laſt words only are the verdict. Again; in the caſe of George Hardie, "The aſſyſe unanimouſlie agrees Jan. 9. 1677. "in on voice, that the pannall George Hardie is guilty of "ane ryott, and aſſoilzies John Kelda, nothing being proven "againſt him." Likewiſe, in the caſe of Alexander Durward, Feb. 5. 1677. "Alexander Buchan chancelar, with conſent of the reſt of "the aſſyſe, finds the pannall free, be the depoſitions of the "witneſſes: *ſic ſubſcribitur.* ALEXANDER BUCHAN, chan- "celar." In like manner, on the trial of Robert Downie, Dec. 17. 1677. "The chancelar and the wholl aſſyſe finds the pannall guiltie "of murder of Jannet Hinſhelwood his ſpouſe." The truth

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is, that the preſent more formal ſtyle[1] ſeems to have been borrowed by the aſſize, ſomewhat unneceſſarily, from the practice of the clerk of Court, who, in extending the trial into the proper ſhape for extracting, which he ſometimes did in the record itſelf, immediately after the minutes of the trial, had been in the uſe of relating the conſultation of the aſſize more at large, in ſuch language and form as he himſelf thought proper. At the period from which the verdicts above quoted are taken, the ſtyle which he uſed ſeems to have been almoſt uniformly thus: "Which perſons of aſſize being choſen, ſworn "and admitted, after accuſation of the ſaid pannel and depo- "ſitions of the witneſſes taken in their preſence, they remo- "ved altogether furth of Court, to the aſſize-houſe, where "they be plurality of votes elected and choiſit the ſaid A. B. "ane chancellor, raiſoned and voted upon the points of the "ſaid dittay, and being ripely and at length adviſit there- "with, and with the witneſſes depoſitions, they re-entered a- "gain in Court," &c.

Preamble of the verdict: If neceſſary.

But farther; is there any good reaſon in the nature of the ſituation, why it ſhould not be preſumed in favour of the ſworn aſſize, as it is in the caſe of any Judge giving forth his decree, that they conſider all the proceedings which are laid before them, and are well and ripely adviſed with the whole caſe, before they decide? Or rather, is there not a peculiar truth and propriety in this preſumption, as applied to the aſſize, who, during the whole courſe of the trial until incloſing, have publicly, under the eye of the Court and the audience,

[1] See too the caſe of Robert Kirkwood, March 13. 1678. "The aſſyſe, be "pluralitie of voices, be the mouth of James Dickſon, ther chancelar, find the "pannall guiltie of the crymes lybelled, as they are reſtricted be the Lords' inter- "locutor, ſubſcryved at Edinburgh, be their chancelar, of the date above wreit- "ten."

audience, been in the continued act of attention to the ſeveral parts of the evidence on both ſides, as they have ſucceſſively been laid before them; ſo that it is at leaſt an extraordinary ſtrictneſs, to require of them an articulate enumeration of the various particulars, or to ſuppoſe that they throw aſide any of theſe, in their final and private deliberation? And indeed the natural preſumption in their favour on that head, can hardly be ſaid to be ſtrengthened by the teſtimony of the preamble now in uſe, which is matter of form only, and the operation of the clerk alone, without the advice of the reſt of the aſſize.

Preamble of the verdict: If neceſſary.

In ſupport of this opinion, I may appeal to the following precedents, where no regard was paid to this ſort of critical and punctilious objection. In the caſe of David Malloch, the preamble of the verdict took no notice of the proof of the libel, but of that in exculpation only. In the caſe of Nairne and Ogilvie, it was ſilent as to the declarations, and other articles of written evidence, in ſupport of the proſecution. In Elizabeth Macnaughton's caſe, it made no reference to the interlocutor of relevancy. In William Mill's caſe, it omitted to mention that the jury had conſidered the pannel's declaration, or the ſtolen goods produced in evidence againſt him. If we revert to the earlier part of this century, inſtances are there to be found of ſtill more material omiſſions, which, in thoſe days, were not thought to afford any plauſible argument for challenging the conviction. Witneſs the caſe of Helen Watſon [1], where the verdict makes no mention of the

July 23. 1750.

Aug. 1765.

Jan. 19. 1767.

Aug. 2. 5. and 11. 1785.

June 2. 1702.

[1] "Having conſidered the Lords' interlocutor, with the pannel's judicial confeſſion, and depoſitions of the witneſſes, they, all in one voice, find it proven, that the pannel Helen Watſon is guilty art and part of the murder of her child." *Hanged.*

CHAP. XVI.

Aug. 6. 1701.

libel; and the caſe of John Carſe [1], where it fails to take notice of either libel or interlocutor of relevancy.

Omiſſion of the pannel's name in the preamble.

ONE omiſſion, however, there is, which is ſaid to be more material, the omiſſion of the pannel's name: For it is argued, that in ſuch a caſe, it becomes uncertain to what libel the verdict relates; and that the verdict returned in one trial, may thus be transferred and applied to another. In truth, this argument did prevail with a majority of the Court, in the caſe of Thomas Hall; whoſe trial recommenced, therefore, with a new aſſize. But as the Bench were not unanimous in that judgment, ſo ſome diverſity of opinion there ſtill continues to be about it. For many have thought, that there is little need of providing in this way, againſt the riſk of applying a verdict to a wrong pannel; a riſk which ſeems to be effectually obviated by ſo many other circumſtances in the form of our criminal proceſs: by the uniform cuſtom of remitting one libel only at a time to any aſſize; by the open ſitting of ſuch an aſſize on ſuch a pannel, in preſence of the Court and the public; by the marking of the names of this aſſize in the record at their appointment, and again at the head of their verdict, in reference to the record; and by the returning of their verdict againſt the pannel perſonally preſent at the bar, wherein they again, publicly and ſubſtantially, though tacitly, recogniſe and fix on this perſon, as the pannel to whom the verdict now returned by them relates. In truth, the proſecutor does not aim here at any extraordinary licence, but is laying claim only to the benefit of

Feb. 13. July 20. 1789.

[2] "And they having conſidered the witneſſes' depoſitions againſt John Carſe, "ſmith, the pannel, they all in one voice find the indytement clearly proven by "three concurring witneſſes." *Hanged.*

of that ordinary rule of conſtruction which is applied to all proceedings at law, and eſpecially to the other ſteps of every criminal trial, namely, that the ſeveral parts of the proceſs are to be taken in connection with each other, and under all their circumſtances of natural relation and coherence; which rule if we ſhall not obſerve, but ſhall ſcrutinize ſeparately each ſtep and act of proceſs, and require in it all the parts and circumſtances of a whole, there is no trial but ſhall be disjointed and fall to pieces.

In confirmation of theſe doubts, notice may be taken of certain caſes (none of which were however laid before the Court in the debate on the caſe of Hall) where there was equal room for ſuch a plea, and where it had nevertheleſs not occurred to the lawyers of former times, as fit to be propoſed. Two of theſe verdicts have lately been recited, that againſt Robert Downie, and that againſt Alexander Durward, both of which were followed with the judgment of Court. Add to theſe the following, taken from the ſame period of our practice. The verdict againſt Margaret Haitly is thus: "The aſſyſe, be the pluralitie of voices, finds the pannall "guiltie of adulterie [1]." In the caſe of Burnet of Barns, "The whole aſſyſe, with on voice, having read, ſeen, and "conſidered the libel, interloquitor of the Lords, and depo- "ſitions of the witneſs thereupon, finds the pannall guiltie of "beating the perſewar at the marcat croce of Peebles, and on "the

See p. 281.

Feb. 5. 1677.

Dec. 17. 1677.

Jan. 13. 1674.

Nov. 27. 1677.

[1] On the 13th January 1674, John Fraſer, the huſband of this woman, had alſo been tried for adultery; and there the verdict was thus: "The aſſyſers "above wreitten, be pluralitie of voits, finds the ſaid John Fraſer guilty of the "crime lybelled;" in which they do not expreſsly characteriſe him as pannel. John Fraſer was pardoned before ſentence.

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See p. 282.

Mar. 13. 1678.
Jan. 10. 1678.

Omiſſion of the pannel's name in the verdict.

" the marcat-day," &c. The like omiſſion occurs in the verdict againſt John Kirkwood; and in the noted trial of James Mitchell [1].

THUS, upon the whole matter, it may perhaps not be preſumptuous to ſay, that there is room to reconſider this queſtion, if any the like caſe ſhall happen to be again before the Court. At any rate, if it be true even in point of form, that the pannel's name muſt be ſet down in the verdict; yet ſtill, as in the caſe of other omiſſions of the like character, there is room to ſupply it, on the teſtimony of the aſſize, at entering their verdict on record, and before diſcharging them of their office. For, if on being queſtioned, they are unanimous in declaring, that the perſon now at the bar is the pannel meant and referred to in their verdict, there ſeems to be no good reaſon why they ſhould not be believed therein, and ſo the man's name be added to the writing. It need not even hinder this rectification, that the jury have diſperſed at the cloſe of their ſederunt, and before returning into Court. For the correction here to be made, is not in any matter which can be the ſubject of influence, or ſolicitation, or which

[1] " As to the firſt part of the libel foundit upon the 4th act, 16th Parliament, " K. Ja. VI. The chancellar, and whol aſſyſe, with on voice, find it proven con- " forme to the Lords interloquitor: As to the invading of biſhops and miniſters, " and wounding the Biſhop of Orkney, ſicklyke proven with on voice: As to the " third part of the Lords interloquitor, concerning his confeſſion, firſt before a " committie, and thereafter before his Majeſty's Hye Commiſſioner and Councill, " the wholl aſſize, with one voice, find it proven conforme to the Lords interlo- " quitor: As to the fourth and laſt part of the interloquitor, concerning the ex- " culpation, the wholl aſſiſe, with on voice, find it noways proven; and furder, " concerning the exculpation, when the pannall was preſſing it ſtronglie upon " my Lord Chancelar, the wholl aſſyſe heard his confeſſion, and acknowledge- " ment of the fact."

which in anywiſe depends on the opinion or inclination of the aſſize; but only to ſupply the mention of a matter of fact, which they cannot alter or pervert, and whereof the true ſtate is as palpable, and as notorious, before as after the amendment which they make of the written form.

Omiſſion of the pannel's name in the verdict.

THIS courſe was taken accordingly, in the trial of Robert Hall, phyſician and ſurgeon in Jedburgh, a caſe of aſſault which came to be tried at that place, in Autumn Circuit 1791. In this inſtance, the pannel's ſurname was omitted in the verdict, which bore to be given on the libel raiſed againſt *Robert*, phyſician and ſurgeon in Jedburgh; and it was ſaid in ſupport of his plea, that there were other medical practitioners in that burgh, of the Chriſtian name of Robert. Recourſe was now had to the aſſize, being ſtill undiſcharged of their office, who were unanimous in teſtifying, that *Robert Hall* was the pannel intended in their verdict; and in particular it was ſaid by the clerk of aſſize, that as he certainly meant to write *Robert Hall*, ſo he thought it probable, that he had inadvertently ſo read out the verdict to his brethren of the aſſize. The Judge thought it proper to remit this queſtion, for the conſideration of all his brethren; but the caſe was not afterwards heard, owing to a compromiſe between the parties.

Sept. 22. 1791.

Concluſion of verdict. Atteſtation.

THUS much as to the preamble of a verdict. The concluſion (for I at preſent paſs over the ſubſtance or body of the writing) is ordinarily in theſe words: "In witneſs whereof "their ſaid chancellor and clerk have ſigned theſe preſents, "in their preſence and by their appointment:" to which the chancellor and clerk ſubjoin their ſubſcriptions. Here I will take occaſion to obſerve, generally, with regard to a verdict, that

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that as this ſort of writing nowiſe falls under the words, ſo neither is it affected by the ſpirit or intendment, of any of the ſtatutes which regulate the atteſtation of deeds. The plain reaſon is, that a verdict is adjuſted, written and ſealed up, in the preſence and under the eye of all the members of aſſize, while incloſed; and that they again own and accept it for theirs, on its being read and entered on record; whereby there is full and abſolute aſſurance againſt any ſort of falſehood or impoſition. The writing is good, therefore, without any atteſtation of witneſſes; neither is it indiſpenſable, though it is uſual and more correct, for the chancellor and clerk to ſign the verdict on every page, where it conſiſts of more than one; nor need the teſting clauſe expreſs the number of pages. On the ſecond of theſe points, a judgment was given in the caſe of Mary Burgeſs[1], where the verdict conſiſted of two pages, and was ſigned by the chancellor and clerk on the ſecond page only. The laſt point alſo was ſettled in the caſe of Elizabeth Macnaughton. It is true, as to the judgment in the caſe of Burgeſs, that the Court would not perhaps have been of a different opinion, with reſpect even to any ordinary civil inſtrument, in the like condition: But, for the reaſons already given, the ſame rule might probably be applied to the caſe even of a verdict conſiſting of ſeveral ſheets.

Nov. 23. 1761.

Jan. 19. Feb. 19. 1767.

Verdicts are general or ſpecial.

VI. It is now time to paſs on from the form, to the ſubſtance or *finding* of the verdict, and to inquire concerning thoſe circumſtances and qualities which muſt meet in it, to make it a lawful and ſufficient ground, whereon ſentence may paſs

[1] "They repel the objection, that the verdict is not ſigned by the chancellor "and clerk in the firſt page; and ſuperſede," &c.

paſs againſt the pannel. I muſt mention in the entry, that verdicts are either general or ſpecial. Whereof the former is a report, complexly, of the reſult of the jury's opinion on the caſe; as that the pannel is *guilty* or *not guilty*, or that the libel is *proven* or *not proven*; and this not accompanied with any diſcloſure of the grounds on which the jury have come to ſuch a concluſion. The other, is a return of certain facts or circumſtances as proved, without the addition of any general inference from them, with reſpect to the pannel's guilt of the crime libelled; an inference which is left to be made by the Judge, according to his opinion of the lawful conſtruction and character of the facts thus laid before him.

General verdict. Hiſtory of the ſtyle of it.

Of theſe two, it appears that the former was our more ancient ſtyle of verdict; though inſtead of the words *guilty* and *not guilty*, they made uſe of the words *fylit*, *culpable*, or *convict*, and *clean*, or *free*, and ſometimes, but more rarely, *innocent*. But afterwards, towards the end of laſt century, when the faſhion was introduced of iſſuing ſpecial interlocutors of relevancy on the libel, this naturally gave occaſion to a correſponding change in the ſtyle alſo of the verdict. For, as in this courſe of proceeding, the aſſize had a rule laid down to them by the Court, not only with regard to the characters of the crime, but the ſufficiency alſo of the circumſtances alleged in proof of it; ſo it was natural for them to acquieſce in this deciſion of the Judges, perſons ſo much more verſant in ſuch inquiries, and to confine their attention to this ſingle queſtion, Was there or was there not ſufficient evidence of theſe circumſtances and preſumptions? And thus the ſtyle of verdict became naturally ſpecial, either by reference to the interlocutor of Court, as where it found *the libel proven in terms of the Lords their interlocutor*;

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or by its own contents, as where it returned a certain ſtate of facts, or found certain of the circumſtances proven, and certain of them not proven, *as mentioned in the Lords their interlocutor.* Nay more, owing to the notion thus encouraged of the proper duty of an aſſize, it naturally came to paſs, in the courſe of time, that even when they returned a general verdict, ſtill it was thought more ſuitable for them to employ the terms *proven* and *not proven*, as clearly referable to their own peculiar department, than thoſe of *guilty* or *not guilty*, which might cover a complex and more enlarged view of the caſe, ſuch as might be alleged to encroach on the office of the Court. It is well known, that after ſubſiſting for many years, this faſhion was broken through in the noted trial of Carnegie of Finhaven, in 1728; where, though there was clear evidence of the act of ſlaughter libelled, yet ſtill the jury being of opinion, contrary to that of the Court, that, on the whole circumſtances of the caſe, the pannel had not contracted the guilt of murder, they aſſerted their ancient and undoubted privilege of finding a general verdict of *not guilty*; which the Court could neither refuſe to receive, nor make the ſubject of inquiry as to the grounds and reaſons on which it proceeded. Not, as has commonly been ſuppoſed, that no other inſtance of a verdict in the like form is to be found in the records of thoſe times. On the contrary, a verdict of *not guilty* was returned but a ſhort time before, in another trial for murder, that of Samuel Hale, in December 1726; on which occaſion alſo the act of ſlaughter was clearly proved, but the Court and jury agreed in their opinion of the ſufficiency of the pannel's defence. That which has attracted ſuch particular attention to the caſe of Finhaven, is not, therefore, ſo much the bare *form* of the verdict, as the difference of opinion between the Court

Dec. 23. 1726.

and

and the jury reſpecting the merits of the pannel's plea, the importance of that plea in the law, and the application of this form of verdict to give effect to the jury's own ſentiments on the caſe.

General verdict. Cannot be queſtioned.

In later times, our juries have freely made uſe of the one or the other of thoſe phraſes, as they have judged more ſuitable to the caſe in hand: not uncommonly, the phraſe *not proven*, has been employed to mark a deficiency only of lawful evidence to convict the pannel, and that of *not guilty*, to convey the jury's opinion of his innocence of the charge. But, whichever term they employ, this is certain, and is neceſſary for maintaining the independence of the jury in their own province, that the Court cannot, and will not decline to carry their verdict into effect: ſo that though a jury find *guilty* without any evidence, or *not guilty* againſt all evidence, nay though they find a verdict againſt their own conſcience both of the fact and the law; yet ſtill, as their deciſion, it muſt and will paſs unqueſtioned with the Court. From the power, however, of doing theſe wrong and unconſcionable things, or any of them, there cannot be any inference to the right. And, eſpecially, as to a verdict of acquittal found by any jury againſt their own knowledge of what is truly the law of the land for the crime libelled; whether becauſe they think the law more ſevere than it ought to be, or the time unſeaſonable for applying it, or the Judges too rigorous in the uſe of their diſcretion therein, or that there are grounds for the extenſion of mercy to the caſe in hand, and that they chooſe rather themſelves to give effect to theſe in this unwarrantable form, than to recommend them to the attention of his Majeſty; I cannot conſider it as any other than an uſurpation of the royal prerogative, or as leſs than an in-

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fringement of their oath of office. The aſſize are as judges ſitting on the particular caſe, and, no more than other judges, can enjoy any power of diſpenſing with or altering the law of their country; in virtue of which alone it is that they are an aſſize, or that the pannel is entitled to the high privilege of trial in that way; and which cannot be ſuppoſed abſurd enough, to have contrived an inſtitution to overturn or elude its own rules and ſtatutes, thoſe rules which it has eſtabliſhed as the beſt and wiſeſt it could deviſe, for the welfare and wholeſome government of all the inhabitants of the land. When they aſſert ſo ſtrange a pretenſion, the aſſize are not laying claim to be judges *of* the law, but to *judge the law* itſelf, and the Legiſlature too, and to ſet their own voice and authority above both. Let it be remembered alſo, that wherever the law is thrown aſide, the trial is ſtill arbitrary, whether the tribunal which has charge of it be a jury or a court, and is in nowiſe leſs liable to abuſe in the hands of the one ſet of men, than of the other.

Verdict of guilty art and part.

BESIDE the forms which have been mentioned, there are many inſtances of another form of general verdict, that of *guilty art and part;* which is truly of the ſame conſtruction and ſubſtance, as a ſimple verdict of guilty. For, as was ſhown on a former occaſion, our accuſation of art and part is a way of charging an immediate concern in the doing of the deed, and indeed has often leſs relation to the manner of the pannel's participation in the crime, than to the nature of the evidence for eſtabliſhing his guilt. Since, therefore, a perſon may regularly be indicted as art and part of a fact, which, according to the very ſtory in the libel, appears to have been executed by himſelf alone; ſo a verdict alſo is good, which finds him guilty art and part on a charge of this deſcription:

ſcription: and of this it would be tedious to enumerate the many inſtances [1] that are on record. Yet, I will take notice of one, as relative to a ſituation of peculiar ſolitude in the nature of the crime. I mean the conviction of Helen Watſon, who being indicted of child-murder, in the uſual way, on the act 1690, had ſentence of death in purſuance of the following verdict: "Find it proven that the pan-"nel Helen Watſon is guilty art and part of the murder of her "own child." On one occaſion, a jury had ſomewhat deviated from the ordinary phraſe, and had returned the pannel (Alexander Peacock) "*acceſſary*, art and part to the murder of Mar-"garet Marſhall his wife," a ſtyle which might be alleged to ſignify rather ſome ſubordinate and relative ſort of guilt. But the Court were of opinion, that here too the words *art and part* muſt receive their ordinary and accuſtomed conſtruction; and the pannel had ſentence of death, accordingly. This caſe was conſidered by the whole Bench, on report from the Judges on a Circuit.

June 2. 1702.

June 13. 1743.

IN whichever of theſe ſtyles the jury have expreſſed their general verdict, it is held to be ſufficiently applied to the libel which is mentioned in the preamble thereof; and it amounts in law to a conviction of all the charges in that libel, how numerous ſoever, as far as they are conſiſtent with each other, and under all their qualities as there ſet forth and

Application of general verdict to the libel.

[1] The Abridger of the Record obſerves on ſome of theſe convictions, "That "they ſerve to ſhow, that a pannel may be convicted of art and part, where "there is but one ſingle fact libelled; ſo that art and part does not properly ſig-"nify *ope et concilio*, which is but an acceſſion to another's guilt, but even com-"prehends the principal actor, and was no doubt introduced in caſes where the "direct fact could not be proved, but only was to be inferred from circumſtances "and preſumptions."

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and deſcribed. But it may happen that a libel charges the fact alternatively, under two denominations of crime which cannot both be true; as for inſtance, if a perſon be accuſed of ſtealing certain goods, or at leaſt buying the ſame at a low rate from the thief, after the fact, and reſetting them, knowing them to be ſtolen. Now, there ſeems to be room for arguing on ſuch a caſe, that if the jury return a general verdict of guilty, or finding the libel proven, or the like, no judgment can paſs on it at all, by reaſon of the uncertainty of its meaning. If the libel is alternative, ſo is the verdict too; and thus the caſe is the ſame in ſubſtance, as if the jury had made their return more at large, finding the pannel guilty either of theft or reſet, but profeſſing their incapacity to determine whether it were the one or the other. That the jury may have intended to find the pannel guilty of one of the crimes only, and that the pannel cannot complain if the Judge ſhall aſſume a preſumption in his favour, of their having meant the lower crime, ſeems hardly to be a ſufficient anſwer to the objection. For there is nothing in the words of ſuch a verdict, to countenance this more than the alternative conſtruction of it. And granting that the jury did mean to find abſolutely for one ſide of the alternative; ſtill it is a ſufficient reaſon why the Judge ſhould not proceed to ſentence, that he cannot know from their verdict whether what he is to do be right in itſelf, and truly conformable to their intention. Yet while I ſuggeſt this doubt to the ſtudent, I muſt be impartial enough to obſerve, that, according to the opinions delivered in the caſe of Murdiſon and Miller, where this point was incidentally ſpoken of, judgment would paſs on ſuch a verdict, as a conviction of the lower crime.

Maclaurin, No. 89.

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General verdict as to pains of law is not good.

I WILL add only one obſervation more as to this claſs of verdicts: that they muſt announce a general concluſion concerning the fact or matter of *guilt*, and not concerning the *pains of law*, which are not for the conſideration of the aſſize, but of the Court alone. If, indeed, a jury find *ſpecial facts*, and ſubjoin to them an erroneous inference with reſpect to their conſequences in law; concluding for inſtance, thus, "*and therefore* find the pannel liable to the pain of death," or, "*therefore* find him liable to an arbitrary puniſhment;" certainly the Judge may proceed to ſentence on the ſpecial matter thus laid before him, without any regard to this inept and incompetent addition. But if, without making any return in point of fact, the jury proceed ſtraightway to form and report a concluſion on the pains of law; the verdict ſeems to be utterly void, as *ultra vires* of the jury in that which it finds, and quite defective in that which it ought to have found. On this ground, among others, it was, that in the caſe of Macgregor, in Auguſt 1752, the Court refuſed to receive from the jury an explanation of their verdict, as to the puniſhment it ſhould infer. I cannot help, therefore, entertaining a doubt, how far judgment ought to have paſſed on any, as in fact it did paſs on all, of the following verdicts. On the 9th of June 1692, Janet Corſe has ſentence of ſcourging and tranſportation, on a verdict which finds her "guil-" tie of arbitrarie puniſhment, and that all in ane voice." Elſpeth Johnſton and Iſobel Crawford, have ſentence of whipping and baniſhment, in like manner, on a verdict which finds them [1] "guilty of ane arbitrary puniſhment." Again, in the trial of Janet Sime for child-murder, "the whole aſ-" ſize,

Nov. 10. and 11. 1702.

Nov. 17. 1702.

[1] "The aſſize, all in one voice, finds Eſpeth Johnſton and Iſobel Crawford, "pannels, guilty of ane arbitrary puniſhment."

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June 19. July 1. 1706.

" ſize, in one voice, finds Janet Syme, the pannel, liable to an " arbitrary puniſhment ;" whereupon judgment paſſed againſt her. Laſt of all, Beſſy Muckroſs, indicted of child-murder on the ſtatute, has ſentence of death on this verdict: " The " aſſize, &c. do unanimouſly conclude the ſaid Beſſy Muck- " roſs, pannel, *guilty of death*, conform to the act of Parlia- " ment, and refers her to the arbitration of the Lords." Theſe verdicts ſeem all of them to be exceptionable, not only as they are an uſurpation by the jury, of that which belongs excluſively to the Court; but alſo, as in form of words they are unintelligible and abſurd. And although it would not be reaſonable to exact of juries a minute and rigorous preciſion in their expreſſions; yet are they not to be pardoned for writing nonſenſe on ſuch an occaſion, or uſing ſuch ſtrange and ſlovenly language, as that of which we here have examples.

It is chiefly under ſpecial verdicts, that queſtions ariſe concerning the form and ſufficiency of what the jury have found. For in uſing many words, it ſometimes happens that they rather darken than elucidate their meaning; and in entering into a detail of particulars, there is always ſome hazard of miſſing that certainty and preciſion, which is attached to the brief and eſtabliſhed phraſes of ſtyle.

Special verdict is bad, if it make a doubtful anſwer.

VI. Towards a good conviction in this form, it is neceſſary that the verdict make a clear and abſolute return of certain facts as proved; not a return in a doubtful, or proviſional, or alternative ſhape, or ſuch as leaves ſome ſeparate matter of fact ſtill to be inquired into by the Court. For to ſettle the whole fact is the proper and peculiar province of the jury; and this cannot be done by any other authority, if they ſhall leave it in anywiſe uncertain. Such an uncertainty may ariſe

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ariſe in ſeveral ways. And firſt the jury may report the facts in ſuch a form, as to leave it doubtful whether the crime in queſtion has been committed at all. As happened in the caſe of Andrew Cochrane, in whoſe trial for uſing falſe weights and meaſures, the jury found [1] his weights light and his meaſures ſhort, but found no grounds for ſpecifying the degree of the deficiency, whether ſo great as to imply dole, or inconſiderable only, and ſuch as might be owing to miſtake or inattention. The Court therefore "having heard and "peruſed the foreſaid indyctment, depoſitiones of witneſs, and "verdict of aſſize above mentioned, they find the verdict of "aſſyſe both unclear and diſconform to the dittay, and thair-"for aſſoilzied, and be thir preſents aſſoilzies, the ſaid Andrew "Cochrane therefrae." In like manner, an alternative return of facts, may ſometimes iſſue in the acquittal of the accuſed. Thus, in a trial for ſheep-ſtealing, the pannel cannot have judgment as a thief, if the jury ſay, that the ſheep in queſtion were ſtolen *or* had ſtrayed; how full ſoever the verdict be in finding the pannel's poſſeſſion of the ſheep [2], and other preſumptions

July 10. 1671.

[1] "Fand the ſaid Andrew Cochrane his weights proven light, as to his ſtone "and quarter weight, but the quantity not proven what they wanted; and his "meaſure proven ſhort, but not the quantity what they want."

[2] In the caſe of James Smith *alias* Gow, tried before the Sheriff of Aberdeen, for ſtealing or reſetting nine wedders, the jury "find it proven that the pannel "James Smith *alias* Gow, at the time libelled, ſold to David Martin, butcher, "three wedder ſheep, which are alſo proven to be the property of Alexander "Graſſick in Balachalach, *and which were ſtolen, or had ſtrayed from his paſture* "ſome months before; find it proven, that the pannel when queſtioned at his "ſheep-cott, about the ſelling of one of the above wedders did prevaricate, at firſt "refuſing, and afterwards acknowledging he had ſold the ſame; find it proven, "that

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tions of his diſhoneſty and evil conſcience. Or again, in a caſe of robbery, as little is there a good conviction, if the verdict bear that the pannel aſſaulted A. B., meaning to rob him, and that in the courſe of the ſcuffle, his pocket-book either was carried off by the pannel, *or* fell to the ground and was loſt. And here, I may refer to the trial of William and James Carruthers and others, in 1731. Theſe men were indicted on a certain ſtatute, for deforcing the revenue-officers, as alſo at common law, for an aſſault and robbery, having carried off certain arms and other things, belonging to the officers. Now as to this article, the jury "fand proven that the "above Robert Kneall and his crew, at the time and place "libelled, brought in ſome fire-arms to the houſe of the "above John Hill, and that they were *loſt, or taken away* "by the foreſaid mob." Sentence paſſed on this verdict, for ſeven years' tranſportation, in terms of the ſtatute, as on a conviction of the deforcement only, and nothing more.

Nov. 2. and 4. 1731.

Special verdict is bad, if it make a doubtful anſwer.

In like manner, on an indictment of more perſons than one for the ſame fact, the verdict is faulty, if it find that the thing was done by one or other of them, and do not afford the means of diſcerning which of them was truly the guilty perſon.

"that four guineas were lodged by John Smith in Loſſie, in a proper hand, to be "beſtowed on Alexander Graſſick the proprietor of the ſheep, on condition of "his diſclaiming all proſecution of the pannel; *find it proven by one witneſs*, that "the pannel gave to John Smith in Loſſie, the ſaid four guineas, to be beſtowed "on Alexander Graſſick as above; *find the bad fame, and ſtealing of ſheep* "*libelled, not proven.*" The Sheriff had given ſentence for two whippings, and baniſhment furth of the county. The Lords of Juſticiary, (26th February 1753), ſuſpended the ſentence as to one whipping, and affirmed it in all its other articles. There ſeems to be room for difference of opinion, concerning the ſufficiency of this verdict.

ſon. And on this ground chiefly, as I take it, proceeded the abſolvitor in the caſe of Buchanan and Lilburn in 1771, where the jury convicted the pannels in the preciſe terms of their own confeſſion, which was thus: "That the pan- "nels, irritated by the continued attacks of the dog, and ha- "ving each of them the ſpit of a jack in their hands, "*both or either of them* in the *fray* gave *a ſtroke or ſtrokes upon* "the head of the ſaid Joſeph Martine with the ſpits in their "hands; of which *ſtroke or ſtrokes* and the wounds thereby "given, the ſaid Joſeph Martin died the day following in "the houſe of the ſaid Robert Anderſon." It could not be determined on this verdict, whether both pannels had ſtruck the deceaſed, or, if one of them only ſtruck, which of the two it was.

Maclaurin, No. 86.

Feb. 13. July 9. 1771.

Another kind of uncertainty in a ſpecial verdict ſeems alſo to be vicious; which is, if it does not announce an explicit opinion of the jury reſpecting the facts mentioned in the verdict, whether they are proved or not[1]. In this view, I may take notice of the verdict in the caſe of Margaret Anderſon; which, however, was followed with ſentence of death. She was indicted of child-murder on the act 1690. The verdict was thus: "Find the libel proven, in ſo far as "ſhe brought forth a child without calling for help in the

Mar. 24. and 25. 1713.

[1] There is this *note* ſubjoined to the verdict in the caſe of John Swinton, (April 21. 1664), who was accuſed of notour adultery and murder: "The aſſize, "becauſe they are not clear that the foreſaid adultery, (whereof they have found "the pannels guilty), is notour adultery, they recommend the ſame to the "Juſtice, and that they have filed them only of ſimple adultery." The Court could not attend to any ſuch recommendation; and therefore, in pronouncing ſentence of death upon Swinton, they proceed upon the narrative of his conviction of the murder only.

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" time of the birth : And alſo they find by plurality of votes, " that the two witneſſes in exculpation are not concurring, in " ſo far as the pannel's declaration anent her being with child " was not poſitive to them." Now, in the firſt paſſage, the jury omit to ſay that the child was dead or miſſing, or that the woman concealed her pregnancy, which, in terms of the ſtatute, are neceſſary articles of the proſecutor's caſe; and in the ſequel, relative to the woman's exculpation, they cannot be ſaid to have given a deciſion, but to have expreſſed a doubt only, concerning the import and ſufficiency of her proof. It is true, it may be anſwered, and probably the Court took it up in this view, that it lay with her to prove the diſcloſure of her pregnancy ; and that the jury could not be ſaid to have found explicitly in her favour, that ſhe had done ſo. But neither had they found for the proſecutor, that ſhe concealed it.

Special verdict is bad, if it make a doubtful anſwer.

AGAIN; if a verdict be returned, ſaying with reſpect to one fact, that it is admitted in the pannel's declaration, and as to certain other circumſtances, that they are ſworn to by ſingle witneſſes, and as to others ſtill, that they are affirmed by ſeveral witneſſes, and are denied by one, and here ſtopping ſhort of any concluſion of *proved* or *not proved*, reſpecting theſe ſeveral particulars, or, which is much the ſame, referring it to the deciſion of the Court, whether theſe things be proved or not; this too ſeems to be at leaſt a queſtionable verdict. For it is the duty of the aſſize, themſelves to form and report their own opinion reſpecting the ſufficiency of theſe modes of evidence; and although, in doing ſo, they will naturally pay regard to the ſentiments which fall from the Court touching the law on that head; yet can they not properly decline to exerciſe their own judgment on the proof, with the help of that advice, or thus, by a reference, devolve their

their office on the Judge, who cannot lawfully uſe or accept it. It is true, that in every ſpecial verdict, it is referred to the Court to make ſome inference, which the aſſize have not made for themſelves. But then, the inference ſo to be made, is of a general and a ſcientific nature, and one for which the verdict itſelf ſupplies the materials: It is an inference in point of *lawful conſtruction*, that the matter found *proven in the verdict* implies, and has all the characters of the crime libelled; or elſe, that the circumſtances found *proven* amount to a relevant or ſufficient proof of the charge. Whereas, in ſuch a verdict as has now been ſuppoſed, no materials are laid before the Court, on which to make any general inference: The aſſize themſelves *do nothing:* They delegate their *whole office* to the Court; and refer it to them to determine reſpecting each particular circumſtance, whether it be proved or not: ſo that properly ſpeaking, there are no facts for the Court to conſtrue or conſider. Nevertheleſs, I cannot but feel diffident in expreſſing this opinion, when I obſerve, that in more than one inſtance, judgment has paſſed on verdicts, which approach at leaſt to that ambiguous character of which I have been ſpeaking; though I ſhall not affirm that the Court, in theſe inſtances, took that view of the matter, but probably rather conſidered them as caſes where the aſſize had unneceſſarily made report of the grounds, and theſe in themſelves ſufficient, on which they proceeded *in convicting*. One inſtance is in the trial, mentioned on a former occaſion, of James Hog and Thomas Soutar, for attempting to ſuborn witneſſes. The jury found a verdict as follows: " By a plurality of " voices, find, that the crime of ſubornation, or, endea- " vouring to ſuborn people to be witneſſes, as libelled againſt " the pannel Mr James Hog, proven in ſundry facts, each " fact only by one ſingle witneſs; as to Thomas Soutar, the " other

July 18. 1738.

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" other pannel, find him art and part in the ſaid ſuborna-
" tion." On this verdict, which has the appearance at leaſt of being a reference of the mean of proof, as ſomewhat a doubtful matter, to the deciſion of the Court, there enſued a long debate; whereof the main ſcope on both parts was, to try by
Aug. 1. 1738. arguments and authorities the ſufficiency of this ſort of evidence, as applicable to caſes of this deſcription. The iſſue was, that the pannels had judgment, as lawfully convicted of
Dec. 11. 1722. the crime laid to their charge. The like heſitation ſeems to
Jan. 14. 1723. be conveyed in the words of the verdict againſt John Troublecock, accuſed of murder, where the jury " find the pannel
" endeavouring to make his eſcape only proven by one wit-
" neſs, and the haill other parts of the interlocutor pro-
" ven by concurring witneſſes;" and here, at adviſing memorials, the Court proceeded to paſs ſentence of death. To theſe I may ſubjoin two precedents of an older date.
July 9. and 10. 1676. One is the caſe of James Patrick, in whoſe trial for aſſaulting, confining, and threatening with a drawn ſword, a verdict was returned, which bears, " and that the ſwords
" being naked, is but proven by one witneſs." But it appears from the ſentence, which is ſevere, that the Court had taken this circumſtance, equally with the others, into their conſideration, as lawfully proved. The other caſe, is that of Urquhart and Webſter, who were tried on 10th Nov. 1685 [1], on a charge of aſſault and ſlaughter, and againſt whom the verdict was thus: " Find John Urquhart and John Webſter,
" pannalls,

[1] In the caſe of Dryſdale and Tannahill, (Jan. 22. June 11. 1705), accuſed of inceſt, the Court baniſhed Dryſdale upon this verdict, " And, as to James
" Dryſdale, we find nothing proven againſt him, except the woman's aſſertion,
" which is proven by concurring teſtimonies, together with her judicial confeſ-
" ſion, which is a great preſumption of his guilt of the crime indicted." But in this the Court muſt have proceeded on the notion, which, as we have ſeen, was then fully eſtabliſhed, of inflicting a lighter puniſhment in caſes of incomplete proof.

" pannalls, liable to condigne puniſhment as the Lords think " fit; in reſpect, finds not the probation altogether clear, ſee- " ing there is but one witneſs that proveth againſt John " Webſter; and the probation of the defunct's declaration " againſt John Urquhart, is ane great preſumption." Theſe men had ſentence of fine and impriſonment.

Facts found in ſpecial verdict, muſt amount to a crime.

VII. How clear ſoever the verdict in its application, and in the finding of facts, yet ſtill it is not a good conviction, if thoſe facts do not amount to a crime, or cogniſable degree of guilt. In like manner as a libel for perjury or reſet of theft is not relevant, if it omit to ſtate in the one caſe, the pannel's knowledge of the quality of the goods, or in the other, his conſcience of the falſehood of his oath; ſo a ſpecial verdict on a charge of theſe crimes is void and fruitleſs, if it happen to be defective in the like particular. And, again, in a trial for child-murder, on the act 1690, it is not a lawful ground of ſentence, if the aſſize return a ſpecial verdict, and fail to mention therein any of the ſtatutory requiſites of the crime; ſuch as the concealment of pregnancy, the unaſſiſted birth, or that the child is dead or miſſing. And on this ground, at leaſt I conjecture ſo, went the abſolvitor in the caſe of Magdalen Alexander, who was indicted on that law, in Auguſt 1715. Agreeably to the practice of thoſe times, the Lords " ſuſtained the defence pro- Dec. 12. 1715.
" poned for the pannel, that during the time of her being
" with child ſhe revealed the ſame, relevant to reſtrict the
" libel to an arbitrary puniſhment." The verdict was thus:
" Find it proven, that about the time libelled, the pannel had Jan. 13. 1716.
" the ſymptoms of a green lighter woman upon her, and alſo
" find it proven, that during the time ſhe was with child ſhe
" revealed the ſame." Whereupon this woman was juſtly Jan. 17.
aſſoilzied;

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assoilzied; in as much as the assize had not found that she was delivered without help, nor that the child was dead or missing.

Facts found in special verdict, must amount to a crime.

THE like question occurred in another case of child-murder, of a later date. At Dumfries, on the 4th of October 1762, this verdict was returned in the trial of Agnes Walker: "By plurality of voices find the pannel guilty of having "brought forth a child without discovering the pregnancy, or "calling assistance during her labour, according to the act of "Parliament, &c. entitled, An act anent murdering of chil-"dren. They are sorry to observe that this law is not so "well published and generally understood as it ought to be, "and they therefore presume humbly to recommend the "misfortunate pannel to the compassion of the Judge, and to "such exertion thereof as to his wisdom shall seem meet." Beside other objections of a more critical nature, her counsel, Mr Crosby, stated, that this verdict did not take notice of the fundamental circumstance, of the child being dead or missing. The issue was, that she petitioned for banishment from Scotland; to which the prosecutor agreed, rather than run the risk of a judgment in her favour.

Facts found in special verdict, must amount to a crime. Feb. 15. 1757.

I WILL mention a few cases more, in farther confirmation of this article of the law. John Grant and several others, were indicted for a riotous convocation, wherein being assembled to the number of 200, and many of them with arms, they proceeded, in a violent and tumultuous manner, to pull down and destroy certain cruive-dikes, of which Sir Robert Gordon and his tenants had long been in possession. The jury "find it proven that the pursuer John Roy was at the time "libelled in the possession of the salmon-fishing at Inchbony, "as

" as tackſman under Sir Robert Gordon of Gordonſtone, Ba-
" ronet, that at time and place libelled the above-mentioned
" pannels, except Alexander Begg and Patrick Hay, againſt
" whom no proof has appeared, with a number of other per-
" ſons under the direction of John Grant above deſigned, did
" aſſemble and pull down and deſtroy part of the braes and
" cruives made uſe of by the ſaid John Roy in the ſaid
" fiſhing, but that it is the unanimous opinion of the ſaid
" jury, that theſe perſons did believe at the time of ſo de-
" ſtroying ſaid braes and cruives, that this was making a legal
" interruption; find it not proven that the pannels were armed
" in the lawleſs manner ſet forth in the libel, and finds that theſe
" and other circumſtances ſerve to alleviate the guilt of the
" pannels." A debate enſued reſpecting the conſtruction of this verdict; and in the end the pannels were *ſimpliciter* aſſoilzied. Mar. 14. 1757.
On their ſide, they had chiefly inſiſted on theſe topics,—the defect of all mention of arms, violence, tumultuous proceedings, or hoſtile purpoſe, on the part of the perſons aſſembled; and that although the *malus animus* be juſtly preſumed in the caſe of any high offence, yet it was otherwiſe as to a matter of this ſort, which was not ſo obviouſly criminal, and with reſpect to which a notion of right might prevail among perſons of their degree.

Facts found in ſpecial verdict, muſt amount to a crime.

In December 1797, John Boyd and others, were accuſed of riotouſly aſſembling, with intent to obſtruct the execution of the militia-act; in the courſe of which enterpriſe, they violently and tumultuouſly broke into the houſe of a magiſtrate, and compelled him to deliver to them the liſts of militiamen for certain pariſhes of his diſtrict. The expreſſions of the verdict, did not amount, however, to a conviction of violence or tumult, but only of the lower, and to the law un-

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known offence, of rudeneſs and incivility. The words were theſe: "Find that the ſaid John Sommerville is not guilty; "and they all in one voice find it proven, that the ſaid John "Boyd, James Greenſhields, &c. did enter into and continue "in Mr Lockhart of Cleghorn's houſe for ſome time, contra-"ry to his orders, and againſt his conſent." Theſe pannels were therefore diſmiſſed *ſimpliciter* from the bar.

Dec. 12. and 15. 1797.

ANOTHER verdict of the like character, was returned on an indictment for the like offence. I allude to the trial of Thomas Carnochan, before the Judges at Ayr, on the Spring Circuit 1798. "They all in one voice find it proven, that "Thomas Carnochan, pannel, was guilty of demanding and "obtaining the Wigton liſt, time and place libelled, from "William Macconell, Eſq; of Culbae, one of the deputy-"lieutenants of the ſhire of Wigton, in a ſtrong but re-"ſpectful manner: but they do not find it proven, that he "ruſhed with violence in the court-houſe, or that he uſed "threats, or was armed with bludgeons or other offenſive "weapons, or that he was concerned in compelling the de-"puty-lieutenants to ſign the obligation mentioned in the li-"bel: That in conſideration of his general good character and "meritorious conduct in his own family, the jury unanimouſ-"ly recommend him to the clemency of the Court: Find the "libel againſt Robert Mactaggart not proven." This caſe was referred for the opinion of all the Judges; and they found that no judgment could paſs on ſuch a verdict. No doubt, in this, as in all the other inſtances, the jury underſtood that they had found facts which inferred ſome degree of guilt; but no regard could be had to this opinion of theirs, which, on the face of the verdict itſelf, appeared to be erroneous.

June 28. 1798.

To

To give one illuſtration more. In the caſe of William Monro, the verdict was expreſſed ſo equivocally, as to authoriſe a doubt concerning the intention of the aſſize, whether it truly was to find the pannel guilty of the crime laid to his charge. This man was a runner in the ſervice of the poſt-office, and was accuſed of *ſtealing* and *feloniouſly abſtracting* four letters, none of them however containing money, from the bag committed to his care. The jury found him "guilty of *abſtracting* at the time libelled, the four letters "mentioned in the indictment, from the mail-bag made up at "the General Poſt-office in Edinburgh, for the poſt-office at "Thurſo;" thus omitting to ſay, that he abſtracted them *feloniouſly*, or *as libelled*. In theſe circumſtances, conſidering the nature of the fact, which might have proceeded from various motives on the part of the pannel, it was not clear whether the jury did or did not mean to find, that he was actuated with a theftuous or felonious intention; and the Court therefore decided, that no ſentence could follow on the verdict. This caſe was conſidered by the whole Court, on report by the Judges on the North Circuit of the preceding autumn. Dec. 24. 1799.

VIII. To be the ground of ſentence, the verdict muſt make a return of that ſpecies of guilt which is charged in the libel, and which alone has been remitted to the knowledge of the aſſize. This indeed is an obvious rule, and was obſerved even at a period of our practice, which had not yet attained to very great preciſion with reſpect to criminal proceedings. In 1663, George Graham, a perſon indicted of theft, applied to the Privy Council for reviſal of his conviction; and certain perſons having in conſequence been appointed to ſit as aſſeſſors to the Juſtice and his deputes, for the trial of his objections, Facts muſt amount to the crime libelled. Dec. 10. 1663.

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the reſult of their deliberations was as follows: "Find that "the verdict foreſaid of the ſaid aſſyſe does not meit the "indictment, ſeeing the indytment is only for theft and art "and pairt thereof, as is ſpeciallie libellit; and the verdict "finds the ſaid George Graham guiltie of the reſetting and "fraudulent uſing of the bond alleged ſtolne, which they find "to be diſtinct crimes: Therefore they have aſſoilzied, and be "thir preſents aſſoilzies, the ſaid George Graham from this "inſtance." On the ſame principle judgment was given in later times, though in a far more difficult caſe, and which ſeems indeed to be open to ſome diverſity of opinion: I mean the

May 30. 1791. caſe of Peter Peddie, who was tried at Perth, on a libel which charged the crimes of rape, and aſſault with intent to raviſh. The jury acquitted him of the rape, and found him guilty of an aſſault, but not with intent to raviſh; whereupon doubts having ariſen, whether this verdict were properly applicable to the charge, the caſe was therefore remitted for the conſideration of all the Judges. Whoſe deciſion was, "that no "puniſhment can follow upon the ſaid verdict againſt the "pannel."

Facts in ſpecial verdict muſt amount to the crime libelled.

NOTWITHSTANDING this caſe, it is, however, an exception to the general rule above mentioned (and in this our practice agrees with the Engliſh) that a verdict is [1] good, if it convict the

[1] Sir M. Hale, Part 1. c. 37. ſays, "That murder and manſlaughter differ not "in the kind or nature of the offence, but only in the degree; the former being "the killing of a man, of malice prepenſe, the latter upon ſudden provocation "and falling out; and therefore it is, that upon an indictment for murder, the "party offending may be acquitted of murder, and yet found guilty of man-"ſlaughter, as daily experience witneſſeth; and they may not find him general-"ly not guilty, if guilty of manſlaughter." The ſame Author, ſpeaking of Larceny, (p. 302.), "So if a man be indicted of ſtealing goods of the value of 10 d., "the

the pannel of an offence which is nearly related to that in the libel, and differs from it only in being a lower mode or degree of the ſame ſort of crime. In which relation ſtand culpable homicide, murder, and parricide; theft and houſe-breaking; and perhaps aſſault and hameſucken, and ſome others. As mentioned formerly, in treating of the ſtyle of libels, our practice ſuppoſes, and perhaps, upon the whole, with good reaſon, that one who is indicted for the higher ſpecies of crime comes prepared with his defences, not againſt the aggravating circumſtances only of the charge, but againſt the fundamental fact alſo, (homicide, theft, or aſſault, or whatever it be), and every degree of guilt which may thence be inferred againſt him. By the ſame rule, therefore, which allows the proſecutor in ſuch caſes to reſtrict his libel, as was formerly ſhown, to a charge of the lower crime; judgment will paſs alſo on a verdict in this form, or which returns facts of this character, though the libel have not undergone any ſuch previous reſtriction. There are two judgments to that purpoſe, on verdicts convicting of culpable homicide, in purſuance of a charge of murder: The firſt, in the caſe of Lieutenant

See vol. i. p. 306.

" the jury may find him guilty only of goods to the value of 6 d., and ſo guilty " only of *petty* larceny."

In July 1787, Henrietta Radbourne, was tried at the Old Bailey, for *petty treaſon*, in killing her miſtreſs. The jury found her guilty of wilful murder, but not guilty of the treaſon. It was doubted whether this conviction was good; but, upon reference to the Twelve Judges, they were unanimouſly of opinion that it was.

At the aſſizes for the county of Surry, in 1772, Withall and Overand, were indicted of *burglariouſly* entering a dwelling-houſe, and ſtealing money to the amount of L. 60. The jury found them not guilty of the *breaking*, but guilty of ſtealing the box and money in the houſe. The Twelve Judges were unanimouſly of opinion, that this conviction alſo was good.

The like opinion was delivered in the caſe of John Comer, on the 30th November 1744. See Leache's Caſes in Crown Law, No. 14. 48. 187.

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tenant Storie, in January 1788, where judgment paſſed without debate; the other in the caſe of Thomas Muir, in January 1798, where the queſtion was argued at large.

Facts in ſpecial verdict muſt amount to crime libelled.

In truth, theſe judgments are juſt the application to general verdicts, of the ſame principle which ſeems always to have ruled our practice, in judging of verdicts of the other claſs. For it is proved from the whole ſeries of our records, that no doubt was ever entertained of proceeding to ſentence on a verdict which made return of ſpecial facts, if they amounted to a degree of the ſame ſort of guilt with that which had been libelled; and indeed, while the cuſtom laſted of iſſuing ſpecial interlocutors of relevancy, it was uſual with the Court to make proviſion there for a verdict of that kind, by aſcertaining, hypothetically, the ſeveral caſes in which the libel might fall to be reſtricted to ſome lower puniſhment. I will not multiply teſtimonies on this head: Suffice it to mention one or two inſtances, out of a great number. Jean Ramſay was indicted for the *murder* of Robert Ramſay, an old and infirm perſon, on a narrative of her having violently ſtruck him with a tongs, and *repeatedly* dragged him from his bed, to the floor. Theſe facts the Court found *jointly* relevant to infer the pain of death; and they alſo found the ſeveral acts of abuſe *ſeparatim* relevant to infer an arbitrary puniſhment. The jury "find, that part of the libel anent "dragging a weak, ſilly and infirm man out of a bed, *once*, in "Iſobel Leſlie's houſe, upon a cheſt and floor, and thereby "wounded and bled, and the ſaid weak and infirm man was "dead about eight or nine of the clock next morning, pro-"ven:" whereupon ſhe had ſentence to be ſcourged and baniſhed the ſhire.

Mar. 24. and 25. 1713.

See Maclaurin, No. 27.

GASPER

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GASPER REYSANO was indicted of the murder of Robert Lamb, by throwing or puſhing him backwards, down ſtairs, whereby the man's ſkull was fractured and he died. The Court were of opinion, that, as related in the libel, the facts did not juſtify a charge of wilful murder; and they therefore found them relevant only to infer an arbitrary puniſhment. The aſſize "find it proven by concurring witneſ- "ſes, that Gaſper Reyſano, pannel, did upon the day libelled, "or thereabout, throw the perſon of Robert Lamb, defunct, "from the door of the ſaid Gaſper Reyſano's dwelling-houſe, "backwards, down the ſtair, by which fall the defunct re- "ceived a bruiſe or wound on the head, or right ear, where- "of he died next morning." Reyſano was adjudged to be tranſported for life.

Dec. 14. 18. and 19. 1724.

IN like manner, John Chriſtie had ſentence of tranſportation on this verdict: "Find proven, that at the time libelled, "the deceaſed George Crookbone, received a ſtroke on his "head, with a ſtone, from the pannel John Chriſtie, of "which he died; and fand likewiſe proven, that the pannel "was drunk, and was firſt attacked by Thomas Crookbone, "brother to the defunct George Crookbone, in which ſcuffle "the defunct engaging, received from the pannel the wound of "which he died." It is true, the libel here bore a charge alſo of the crimes of riot and aſſault; but in ſubſtance, this verdict was not a conviction of either of theſe offences, but of a lower ſpecies of homicide.

Facts in ſpecial verdict muſt amount to crime libelled.

Nov. 19. Dec. 11. and 14. 1733.

IF we revert to the more diſtant periods of our practice, we ſhall find that our Judges had not heſitated concerning either the competency or propriety of proceeding to ſentence, in any caſe even where the verdict laid before them an offence

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Mar. 20. and Apr. 10. 1699.

offence nearly related to that in the libel, though it were not properly a lower ſpecies of the ſame crime. Thus, on the indictment of Elizabeth Key, which was for murdering her apprentice, by expoſing her in the ſtreet, in the night, when infirm and ailing, the Court "found the indictment as "libelled relevant to infer the pain of death againſt the pan-"nel; and alſo found, that if ſhe carried out the child after "ſhe was dead, as is libelled, relevant to infer an arbitrary "puniſhment." In this laſt article, they proceeded on a minute for the proſecutor, making a ſuggeſtion to that purpoſe; for the libel did not bear any ſuch charge of the expoſure of a dead body, though the words of the interlocutor, which are improper, ſeem at firſt ſight to ſay the contrary. The jury found the murder of the child not proven, "but finds it proven that the child was carried out dead, and "expoſed by the ſaid pannel Elizabeth Key, in the manner "as is mentioned in her indytment, and therefore liable to "an arbitrary puniſhment in the terms of the Lords' inter-"loquitor." Whereupon ſhe had ſentence of pillory and baniſhment from Scotland[1].

Verdict muſt be applied to the indictment.

IX. We have ſtill to attend to one circumſtance more in the deſcription of a regular verdict: It muſt apply to the indictment,

[1] It is another confirmation of the ſame notion, that our Courts anciently, in capital caſes, were in the common uſe of inflicting arbitrary puniſhments, on verdicts finding preſumptions only, or partial proof of the circumſtances required, by the interlocutor of relevancy. Indeed it has been ſhown already, with numerous examples, that the interlocutor of relevancy itſelf often made proviſion for ſuch a thing, by a ſpecial finding relative to each preſumption, or to combinations of them, ſhort of the whole. See Maclaurin's Caſes, No. 12. 17, 18. 28.;—the caſe of Murray and Guine, 29th December 1691;—of Helen Wilſon, July 23. 1722.

dictment, and convict the pannel, not only of the ſpecies of crime, but of the particular fact which is charged; for that the pannel has been guilty of theft or murder, is no lawful ground of ſentence, unleſs it be the very theft or murder which is related in the libel. It is, however, very neceſſary to obſerve on this head, that the conviction is good, if the verdict be applied to the charge ſufficiently in ſubſtance, and to ordinary apprehenſion, though the writing be not expreſſed in the moſt correct faſhion, nor in any technical form of words, nor in ſuch phraſe as is an echo to the libel. Preciſion and conſtancy of ſtyle, may indeed be juſtly expected in the proceedings of the Court; perſons verſant in law and buſineſs, and who being in the daily habit of attention to ſuch matters, have it in their power to maintain uniformity of practice, and to profit by the miſtakes into which their predeceſſors have fallen. But as all theſe particulars are quite otherwiſe with ſucceſſive juries, ſo it is reaſonable, and neceſſary indeed to the courſe of juſtice, to diſpenſe with a critical or punctilious correctneſs in their phraſeology, a thing which by no degree of care or pains on the part of the Judge can ever be fully ſecured, and to conſider verdicts in their ſubſtance, and whole circumſtances of relation to the caſe; not as entire and ſeparate deeds, but in their natural coherence to the other proceedings; and to let them be invalidated on the ground of actual ambiguity only, or groſs and unpardonable careleſſneſs of expreſſion. More eſpecially, this will ſeem to be the right courſe, if it is conſidered how little reaſon there can be to believe in any caſe, that a jury are to find a verdict concerning other and different crimes from thoſe in the libel, which alone have been remitted to their knowledge.

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THIS general concluſion concerning the character of our practice, ſeems to ariſe on the conſideration of theſe caſes[1]. In the trial of Elizabeth Macnaughton, for ſheep-ſtealing, Jan. 19. Feb. 19. 1767. the verdict was challenged on this ground, that it did not expreſs that the ſheep which ſhe had ſtolen were the ſheep libelled: But to this it was thought a ſufficient anſwer, that, in the preamble, the verdict bore reference to the libel, in the uſual way, and that, like the libel, it deſcribed the ſheep ſtolen by the pannel, as the property of Duncan Macnaughton. In the trial of John Leprevick, at Dumfries, for the like crime, June 22. and 30. 1784. verdict was returned thus: "Find the libel ſo far proven, that "the ſaid John Leprick *alias* Lepryk is guilty art and part of "the crime of ſheep-ſtealing, and ſelling fifteen or more of "the ſheep libelled." It was plain enough, that, though ſomewhat inaccurate, this verdict did, however, ſubſtantially convict the pannel of ſtealing and ſelling fifteen of the ſheep libelled; and judgment was given accordingly, on reference of the caſe for the opinion of all the Judges. The like exOct. 10. 1797. ception was taken, in the trial of Robert Lillie and others, for riot in hinderance of the execution of the militia-act. Theſe were the words of the verdict: "Guilty of mobbing "and rioting with the intent and purpoſe of violently reſiſt-"ing and oppoſing the execution of a public law." But here likewiſe, partly by the general reference of the verdict to the libel, and partly by the tenor and ſubſtance of what was found, the application was held to be made ſufficiently clear; and the pannels had judgment accordingly.

IN

[1] In the trial of William Blair and others, (Aug. 3. 1681), for wilful error, where a general verdict of guilty had been returned, "Mr Pringle alſo alleged, "that the verdict did bear them *guilty*, but not *of error*; and therefore the Juſ-"tices could not proceed to ſentence againſt them upon that verdict." No regard was paid to this objection, and the Court proceeded to ſentence.

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Verdict muſt apply to the libel.

In theſe ſeveral inſtances, the alleged flaw of the verdict was the ſubject of debate at the bar, and of deliberation among the Judges. But the truth is, that it is only of late years, that the faſhion has crept in of inſiſting on pleas of this character; and that in many older caſes, verdicts paſſed without queſtion or challenge, with reſpect to which there was at leaſt equal room for this ſort of objection. To mention but a few examples. In the trial of James Ochterlony for forging certain ſtamps, the verdict is thus: "Find it proven "that the pannel James Ouchterlony did make uſe of a "ſcrew-preſs, and counterfeit ſtamps, impreſſing, counterfeit-"ing and reſembling his Majeſty's ſtamps upon paper." Here, it is true, the aſſize had not ſaid, that theſe ſtamps were the ſtamps *libelled*, nor that the pannel counterfeited ſtamps, *as* libelled; yet their meaning was plain, and the man had ſentence of death accordingly.

Feb. 21. 1716.

In the trial of Alexander Macgregor for breaking priſon, the jury find it "proven that the pannel eſcaped out of the "tolbooth of Edinburgh, but uſed no violence in his eſcape." They do not add, that he eſcaped at the time, or on the occaſion libelled: Nevertheleſs ſentence followed on the verdict. Let me quote too the verdict againſt Hamilton and others, indicted as acceſſory to Shawfield's mob (as it has been called) at Glaſgow: "Find all in one voice proven, that the above-de-"ſigned William Hamilton was in the mob both on the ſtreet "and in the houſe of Daniel Campbell of Shawfield; and alſo "finds it proven, that the above Walter Buchanan was in the "mob in Mr Campbell of Shawfield's houſe, and in the mob "at the guard that threw ſtones at the ſoldiers, and in that "mob that brought back the two ſoldiers as priſoners, and "the ſaid Buchanan having a gun; as alſo finds it proven

Aug. 5. and 9. 1720.

Oct. 14. and 15. 1725.

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" that the above John Macfarlane was in the mob in Mr " Campbell of Shawfield's houſe; as alſo finds it proven, that " the above Patrick Mitchell was in the mob in Mr Camp- " bell of Shawfield's houſe; as alſo finds it proven, that the " above Janet Balleny was in the mob that drew the cha- " riot along the ſtreets towards the Gorbals." Judgment paſſed againſt all theſe pannels: Though, in later times, it might probably have been objected, that the verdict had failed to characteriſe one of theſe mobs, as the mob libelled, or by giving any account of its proceedings, other than that it was the mob in Shawfield's houſe. But it had been held, that, in ſo doing, the jury ſufficiently fixed and deſcribed this mob, as that which was mentioned in the libel, and as guilty of the ſeveral outrageous diſorders there related.

Application of verdict to the libel.

And here, in connection with the caſe laſt mentioned, I am led to obſerve, that, according to the conſtruction of our practice, in any caſe where the verdict makes reference to the libel for any act or proceeding, it is held to refer alſo to the ſame authority, for the deſcription and character there given of ſuch act or proceeding; and thus virtually to find the *corpus delicti* proved, with all the qualities and circumſtances which are there ſet forth as attending it. In the caſe laſt mentioned, the jury, in their verdict, give no account of the proceedings of the mob in Shawfield's houſe, but of that on the ſtreet only: Nevertheleſs, having uſed ſuch terms, and mentioned ſuch circumſtances, as were applicable only to the mob libelled, they were held ſubſtantially to have found a proof of all thoſe exceſſes related in the libel, of breaking into, rifling, and defacing that houſe; and the offenders, in conſequence, were adjudged to ſuffer all the higheſt arbitrary pains.

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Application of verdict to the libel.

THE ſame branch of our practice, ſupplies us with farther inſtances of the like conſtruction. In the caſe of John Fraſer, the jury "find it proved that the pannel John Fraſer was "preſent and active in the mob and riotous aſſembly *mentioned*, and that he groſsly inſulted the Sheriff, Mr Cockburn, "in the execution of his duty." What this aſſembly had done, or how they were employed, the jury do not expreſsly find: Yet the pannel had ſentence of tranſportation; which could only be warrantable on this notion, that the verdict had virtually engroſſed the ſeveral outrages of aſſaulting, damaging, and deſtroying, of which the libel gave an account. Richard Robertſon had the like judgment on this verdict: "They "unanimouſly find it proved, that he was engaged in the "riot at the houſe of Millfield; but do not find it proved "that he had any hand in *demoliſhing or pulling down the ſaid* "*houſe*." Now, beſide thoſe acts of violence, of which the jury thus acquitted him, the libel charged that the mob had rifled the houſe of Millfield, and plundered or deſtroyed its whole contents; and it appears from the ſentence, which was of tranſportation for life, and was given after hearing parties, that the verdict had been thought ſufficiently to characterize this mob, as guilty of theſe exceſſes. Reference may be made to the caſe alſo of Johnſtone and others, reported in Maclaurin's Caſes; and, more lately, to the caſe of Robertſon and Berry, tried in February 1793. Theſe perſons were indicted of printing and publiſhing a wicked and ſeditious pamphlet; and a verdict was found as follows: "Find "it proven that the ſaid James Robertſon did print and pu-"bliſh, and that the ſaid Walter Berry did publiſh only, the "pamphlet libelled on." Now, it was held on the Bench, that the jury had ſubſtantially characterized and deſcribed this pamphlet, under all the epithets applied to it in the libel;

July 26. and Aug. 6. 1784.

Mar. 16. and 17. 1773.

No. 87.

Feb. 19. 1793.

CHAP. XVI.

Mar. 18. 1793.

bel; and that the inference of dole or criminal intention aroſe directly from the fact of printing or publiſhing a work of this deſcription. In ſhort, I muſt again ſay, that a verdict of aſſize on a criminal charge, is not to be conſidered as a writ of fixed and formal ſtyle, like that of the inqueſt on a brief of ſervice, which muſt repeat the *verba ſolennia* of the brief and claim, and have a critical juncture with them at all points; but as a report and concluſion only, by perſons who are not practitioners in law, on a matter of fact which has been openly remitted to their knowledge, and with reſpect to which plain ſenſe and common underſtanding, muſt furniſh the principal means of expoſition.

Special verdict finding circumſtances not libelled.

BEFORE leaving this article, it may not be amiſs to take notice of one ſort of deviation from the libel, of which our practice makes free allowance, as not being truly ſuch, but in appearance only. It has been explained at large, in the hiſtory of our charge of art and part, that the proſecutor is at freedom to eſtabliſh the pannel's guilt by any whatſoever train of relevant circumſtances, equally as by thoſe which are related in his libel. It is not therefore any flaw in a ſpecial verdict, that it makes a return of facts, if relevant in themſelves, which are no part of the ſtory told in the indictment. As a general verdict of *guilty art and part* would be unexceptionable; ſo this muſt be ſo likewiſe, which falls under and applies to that part of the charge. I ſhall mention but one example of ſo obvious a rule.

Dec. 3. and 15. 1760.

In the trial of Kirkpatrick and others, for riot, the jury found, *inter alia*, "that while Baillie William Clarke was "reading the proclamation againſt riots, as libelled, the ſaid "William Kirkpatrick called out to take the book or act "from him the ſaid William Clarke." Now, this circumſtance

ſtance had not been ſtated in the libel; and it was pleaded, that the Court could not therefore at all conſider or regard it, in paſſing ſentence. But the anſwer was ſuſtained, that, in itſelf, ſuch behaviour was good evidence of the pannel's acceſſion to the riot [1]; and that there was no need of libelling the particular way, in which his participation was to be eſtabliſhed.

Duty of Court under ſpecial verdicts.

SPECIAL verdicts are of two ſorts, with reſpect to the nature of the duty which they devolve on the Court. It is true, that they always leave it with the Judge, to make ſome general inference or concluſion with regard to the guilt of the accuſed; but ſometimes this is an inference purely in point of law, and ſometimes it is an inference in point of fact. Of the former kind is this verdict, given in the trial of Sir Godfrey Macculloch for murder: Feb. 16. 1697. "Finds it proven by the teſtimo-
"ny of the witneſſes adduced, that the pannel Sir Godfrey
"Macculloch of Myretown did give the deceaſed William
"Gordon of Cardineſs a ſhot in the leg beneath the garter,
"by which his leg was broke, and finds it alſo proven by the
"concurring teſtimony of the witneſſes adduced, that the
"ſaid deceaſed William Gordon of Cardineſs died that ſame
"night." And this in the trial of Davis and Wiltſhire for Mar. 14. 1740. the like crime: "Find it proven, that at or about the time
"libelled, Thomas Davis, pannel, diſcharged a firelock at the
"deceaſed

[1] In the ſame caſe, it was objected for John Gordon, another of the pannels, that the verdict only found him guilty of violently entering a certain houſe, and of uſing threats in general, and not in name of 150 of the trades, as libelled. It was obvious, that there could be no need of engroſſing the preciſe words of the man's threats; and that a variation in the mode of them was not material, if they ſtill indicated the criminal purpoſe libelled. This objection alſo was overruled.

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" deceaſed John Mather, whereof he received a mortal wound " of which he ſoon thereafter died, and that Charles Wilt- " ſhire, the other pannel, deſired the ſaid Thomas Davis to " fire." This too in the trial of Robertſon and Berry, for printing and publiſhing a ſeditious libel: " Find it proven, that " the ſaid James Robertſon did print and publiſh, and that " the ſaid Walter Berry did publiſh only, the pamphlet libel- " led on." In theſe inſtances, the verdicts fix on the ſeveral pannels the fundamental facts of killing, exhorting to kill, printing, and publiſhing, as libelled: And nothing remains for the Court, but to ſettle the concluſion in point of law, whether from the fact thus found there ariſe a juſt inference of that dole or criminal intention, which is eſſential to the crimes of murder and ſedition. The Court accordingly make that inference, and give judgment againſt the pannels reſpectively, as convicted of thoſe crimes.

Feb. 19. 1793.

Duty of the Court under ſpecial verdicts. Feb. 24. and 25. 1707.

As an example of the other ſort of ſpecial verdict, I ſhall quote that which was returned in the trial of James Lauder, for the murder of his father: " Finds it proven, that the pan- " nel leaped the ſtair, and the defunct cried, *Hold the dog,* " *for he has ſticked me in the throat,* of which wound he died " immediately; and when the witneſſes came to take up the " defunct, they found none with him, nor no weapon near " him, nor about him; and likewiſe, all with one voice [1], find " the

[1] This is expreſſed awkwardly; but the meaning ſeems to be, that the pannel took guilty to himſelf by abſconding, or, that his abſconding is a preſumption of his guilt.

In this caſe alſo, we ſee another ſtrong illuſtration of what has been ſaid reſpecting the application of the verdict to the libel. For here, in form of words, there is ſcarce any reference to it at all. Even the name of the deceaſed is not mentioned in it.

"the pannel guilty by abſconding him." Now, in theſe words, the jury do not find the *fact of ſlaughter or killing* proved, but only certain circumſtances and preſumptions of that tendency, and from which they rather chooſe to leave it to the Court to draw the general inference of *proved or not*, than to venture on making it for themſelves. In truth, therefore, this ſort of verdict is in ſome ſort a devolution, ſanctified by uſage time out of mind, of the buſineſs of the jury on the Court. It is no doubt true, that, though tending to a concluſion in point of fact, every ſuch queſtion is alſo in ſome meaſure a queſtion of law; as depending on thoſe rules of conſtructive evidence, in which profeſſional men only can be expected to have a thorough ſkill. And on this ground reſted the old practice, though certainly far better laid aſide, of giving ſpecial interlocutors of relevancy on hypothetical caſes of circumſtantial proof; wherein, without the authority of a reference from the jury, the Judges exerciſed the like power of conſtruction.

Powers of the Court in judging of ſpecial verdict.

Or whichever kind the verdict be in this reſpect, one thing is certain, that as written out and returned to the Court, it ſerves them as the only text for their deliberations, and contains the entire and complete caſe of which they are to judge. That is to ſay, the Court can pay no regard to any other particulars or circumſtances of the ſtory, how clearly ſoever they themſelves may think that ſuch have been proved; nay though it be owing to inadvertency only, or miſtake on the part of the aſſize, that no notice is taken of theſe in the verdict. But it is equally well eſtabliſhed on the other ſide, and is founded in ſound reaſon and ſubſtantial juſtice, that for the purpoſe of elucidating and applying the circumſtances which *are* returned in the verdict, as far as theſe are ſet down in general

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terms, the Court may look into the evidence concerning theſe particulars: for in doing ſo, they make no addition to the *finding* of the verdict, but come to a better and more preciſe underſtanding only of that which has been found. Thus, in a caſe of murder, if the jury find, among other circumſtances, that the pannel had previouſly threatened the deceaſed, the Judges may reſort to the proof, for the ſpecial words and import of his threats. Or in a caſe of aſſault, if the verdict find, that the pannel repeatedly ſtruck the deceaſed with a baton, it is lawful for the Judges to collect, if they can, from the teſtimonies in the trial, the number of the blows, whether few or many, and the ſize and weight of the baton, whether great or ſmall. Yet certainly it muſt be allowed, that this is a nice diſtinction, and that in conducting ſuch inquiries, it is very neceſſary for the Judge to keep a ſtrict watch on his attention, leſt he be imperceptibly drawn on from the explanation of the facts which are found in the verdict, to the inference of other and diſtinct ones. Nevertheleſs, he muſt be truſted with the exerciſe of this power, that the trial may have an iſſue according to the juſtice of the caſe. For ſome hypotheſis with regard to the import of the threats, or the number and violence of the blows, the Judge muſt proceed on; either that the threats were pointed and violent, and the blows numerous and heavy, or the contrary: and to hinder him from engaging in ſuch an inquiry, would be to retrench and ſet aſide, unneceſſarily, a part of what the jury have found. I ſay without neceſſity: for in the caſes above ſuppoſed, the words of the verdicts are not contradictory or unintelligible, or even ambiguous or equivocal, but general only, and capable of meanings of different degrees; whereof, if not allowed publicly to inquire, the Judge may as warrantably aſſume that which is moſt unfavourable

vourable to the pannel, as any other. This matter met with a full diſcuſſion, and was ſettled agreeably to what has now been obſerved, in the caſe of Alexander Livingſton, and in that of Nicol Brown. Maclaurin, No. 55. No. 66.

HAVING ſeen that the Judge cannot *add* to the ſubſtance of the verdict, let us next inquire whether he be at liberty in any caſe, to diſregard any thing that is returned in it, or to decline compliance with any of its concluſions. Reſpecting the anſwer to be made to this queſtion, in the ordinary caſe of a ſpecial verdict, which ſimply finds that certain facts or circumſtances have been proved, it muſt plainly be an anſwer in the negative. But we have inſtances alſo, though more rare, of verdicts of a mixed nature, between ſpecial and general; in as much as they find that certain facts are proved, and bear, moreover, a general concluſion of *proved or not proved*, different from what thoſe ſpecial premiſes may ſeem to require: or perhaps the aſſize conclude with ſome ſpecial and abſurd *finding*, ſuch as overturns and confounds the juſt application of the others. But, how inept or unreaſonable ſoever the concluſion, if it be one in point of fact, and be clearly ſet down in the verdict; for aught that I can ſee, the Judge is not at liberty to meddle with or queſtion it, but ſhall regard it rather as a law laid down to him, on which he is to proceed as the truth: Becauſe the fact is the undoubted and excluſive province of the jury. It is true, there is a well known precedent, which may here be cited againſt me. In the trial of the Maſter of Burleigh, in 1709, for the murder of Henry Stenhouſe, a ſchoolmaſter, by ſhooting him with a piſtol, the aſſize returned the following verdict, without a parallel, it is to be hoped, in the records of our practice: "They do, by the plurality "of voices, find it proven, that the ſaid Robert, Maſter of

Powers of the Court under a ſpecial verdict.

Mixed verdict between general and ſpecial.

Maclaurin, No. 20.

Aug. 4. 1709.

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" Burleigh, was at the ſchool-door of Mr Henry Stenhouſe, " ſchoolmaſter at Inverkeithing, with piſtols, mounted on " horſeback, at or about the time libelled; and likewiſe find " it proven, that the ſaid Robert, Maſter of Burleigh, did " diſcharge a piſtol againſt the ſaid Mr Henry Stenhouſe; as " alſo finds it proven, that the ſaid Mr Henry Stenhouſe was " wounded in two places, on his left arm below the ſhoulder; " and that he died within twelve days after he was wounded: " but find it *not proven* that the ſaid wounds were given by " the ſhot of the piſtol diſcharged by the ſaid Robert, Maſter " of Burleigh." By ſuch a concluſion, this crafty and unconſcientious aſſize, probably thought that they had placed the pannel out of all danger of his life. But the Court thought otherwiſe; and after ſome delay proceeded to paſs ſentence on him, as convicted of the murder. And ſurely we cannot think it wonderful, that in ſo miſerable a caſe of murder, the Judges were deſirous, if they could, to get the better of this laſt, equally abſurd and impudent member of the verdict, requiring farther proof of a matter, which, in the nature of things, could not be any otherwiſe or better proved [1], than by the very facts

Nov. 14. 1709.

[1] The wrong was the more ſhameful, as the deceaſed ſeems to have conducted himſelf with great temper and forbearance, on occaſion of the fatal interview with the pannel. Nay, equally ſo after receiving the wound, which is fixed on the pannel by the words of his own mouth at the time. It was ſworn by two witneſſes, who were preſent at the fact, that Stenhouſe, on being wounded, ſaid calmly to the pannel, *Sir, you have not miſſed your mark;* to which the pannel anſwered in great rage: *You dog: but I have not hit the right mark.* Meaning that he had not ſhot him through the head, and laid him dead on the ſpot.

The jury, in this unparalleled caſe, conſiſted of five Baronets, ſix other landed men, and four merchants in Edinburgh.

The pannel avoided execution of the ſentence, by eſcaping from gaol diſguiſed in his ſiſter's clothes. He ſeems to have met with favour, from all but the Judges.

facts which the aſſize themſelves had found. Yet ſtill, ſince the aſſize had reported it as the clear reſult of their deliberations in point of fact, that the neceſſary circumſtance, of the deceaſed being killed with the pannel's ſhot, was not eſtabliſhed, (which in ſubſtance was the ſame as adding a general concluſion of *not proven*), it bears a doubt whether it would not have been better, and more regular, that the pannel had been allowed the full benefit of this diſgraceful and iniquitous acquittal.

Powers of the Court under ſpecial verdicts.

AND on this principle the Court ſeem to have gone in later inſtances, in ſome meaſure at leaſt of the ſame complexion. The verdict, in modern times, which ſeems to be the moſt ſuitable companion, though it is however an unequal one, for that in the caſe of Burleigh, is the verdict in the trial of James Stein, for attempting to bribe Mr John Bonnar, Solicitor of Exciſe. As related in the libel, the fact was thus: That the pannel, a diſtiller, had endeavoured to corrupt that officer with a bribe of L. 500, which he ſuddenly thruſt into his pocket, in bank-notes, contained in a ſealed parcel, which bore a note in the pannel's hand, "This to be repeated an-" nually." On the part of the pannel, it was not attempted to be ſhewn, that there was any lawful, or moral, or excuſable cauſe, for this unuſual allowance to Mr Bonnar, by a dealer who was ſubject to his official control. The jury, however, thought that they had grounds to find as follows: "All in one voice, find the delivery of L. 500 Sterling to Mr " John Bonnar proven; but do not find the intention of ſe-" ducing and corrupting the ſaid John Bonnar proven." Mr Stein had his abſolvitor, accordingly, in the Criminal Court. But in a civil proceſs, which was afterwards raiſed in the Court of Seſſion, at inſtance of Stein's creditors, for recovery

Dec. 4. and 5. 1786.

of

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of this money from Mr Bonnar, ſo different an opinion had the Judges of the purity of the gift, that they refuſed to ſuſtain the action.

Powers of the Court under ſpecial verdicts. Dec. 15. 1766.

THE following caſe alſo, ſeems to be in ſome meaſure an illuſtration of the ſame rule. In the trial of John Reid, for ſheep-ſtealing, the firſt part of the verdict is thus: "All in "one voice find the ſaid pannel being habite and repute a "common thief, not proven; and by a plurality of voices, "find it *not proven that he ſtole* and carried off the ſixſcore "of ewes, or thereby, from the farm of Craigkingle-doors, "the property of Robert Laidlaw, tenant there, and his "herd." And then it proceeds thus: "But with one voice "find proven, that ſoon after the ſheep were carried off the "ſaid farm, the ſaid pannel came to the houſe of Malcolm "Brown, innkeeper at Camlachie, near Glaſgow, with ſix-"ſcore of ſheep, or thereby, in his cuſtody, which he offered "there to ſale; and which ſheep, thereafter, were claimed "by the ſaid Robert Laidlaw, who brought a proof that the "above-mentioned ſheep were his property." Many will be diſpoſed to think, that there was here ſufficient matter, upon which to convict the pannel, as art and part of the theft; but as the jury ſeemed themſelves to have made the general inference of *not proved* in his favour, the Court were of opinion, that they had no power in the caſe, but to diſmiſs him. He did not make the proper uſe of this good fortune; but continued to follow the ſame trade of ſheep-ſtealing, and had ſentence of death for it, in ſummer 1774.

HAVING mentioned this judgment, I muſt not omit to take notice of two other caſes, which had a different iſſue, although, at firſt ſight, they ſeem to be nearly of the like character.

racter. One is the caſe of Livingſton, reported by Maclaurin (No. 55.), where the verdict was thus: "By a plurality of "voices, find it proven, that, the time and place libelled, "the pannel threatened harm to the deceaſed Alexander Hen-"derſon, ſon to George Henderſon, carter in Falkirk; and "that the ſaid Alexander Henderſon was ſtabbed or wounded "in his left ſide, of which he died; *but find it not proven that* "*the pannel was the perſon who ſtabbed or wounded him:* And "further find it proven, that the pannel, at the time and "place libelled, was ſeen with the aforeſaid Alexander "Henderſon, having a ſharp-pointed unfolded pen-knife in "his hand: And alſo find it proven, that the pannel was "twelve years of age in the month of March laſt, and that "he is *doli capax.*" On mature deliberation, the Lords pronounced ſentence on this verdict, baniſhing the boy to the plantations for life.

THE other caſe is that of John Samuel, who was tried in July 1742, for the *crimen violati ſepulcri.* This was the verdict: "Find, at time libelled, John Samuel, pannel, was ſei-"zed at Potterrow-Port of Edinburgh, with a bag or pock "under his arm, containing a dead male child; and likewiſe, "find it proven that the child ſo ſeized, was Eaſton Johnſton, "ſon to Robert Johnſton, purſuer, as libelled; and find it "likewiſe proven, that the grave of the ſaid Eaſton Johnſton "in Pentland burial-place has been broken up, and the body "carried out of the coffin; *but do not find it proven that the ſaid* "*J. S. opened the ſaid grave.*" Sentence paſſed upon this verdict alſo. But in neither of theſe inſtances, did the Court in anywiſe mean to diſregard the deciſion of the aſſize. Taking the whole context of the verdict together, they were of opinion, that the aſſize did not intend to find a general concluſion

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concluſion of *not proven* in favour of the pannel, but only a ſpecial one, that there was no *direct evidence* againſt him, of the act of ſtabbing, or opening the grave; leaving it alſo with the Judge, to determine on the ſufficiency of the circumſtances which they had found proven.

A QUESTION in ſome meaſure of the ſame nature, aroſe on the verdict in the trial of Janet Gray for child-murder, at Jedburgh, in April 1798. She had been indicted in the uſual way, both at common law, and on the act 1690. The verdict was thus: "Find the pannel Janet Gray "guilty of the crime charged in the indictment, in ſo far as "it is founded upon the 21ſt act of the 2d ſeſſion of the "1ſt Parliament of King William and Queen Mary, intitu-"led, *An act anent murdering of children*, libelled on; but, by "a plurality of voices, find that the *actual murder* mentioned "in the indictment, *is not proven* againſt the ſaid Janet "Gray." This caſe was remitted from the Circuit, for the opinion of all the Judges, and informations were ordered, and entered on record, (July 11. 14. 1798); but judgment was prevented by a petition for baniſhment, on which the Lord Advocate gave his conſent. In this caſe, as in that of Livingſton and Samuel, the meaning of the verdict ſeems to have been, that there was no *direct evidence* of the murder, but only *preſumptive evidence*, in terms of the act 1690.

What if ſpecial verdict bear an inept concluſion in law.

HITHERTO, of an erroneous or inept concluſion in point of fact. But ſhall it be held, that the Court are equally bound by the deciſion of the jury, where it is one in point of law, and appears alſo, from the face of the verdict itſelf, to have been formed on falſe and erroneous grounds? Suppoſe ſuch a verdict as this, in a caſe of murder or culpable homicide: "Find

"Find it proven, that A. B. pannel, with a piſtol, did fire at "and kill C. D. mentioned in the libel, but find that A. B. "at this time had ſuffered provocation of *abuſive words* from "the ſaid C. D., and *therefore* find the ſaid homicide *juſtifiable*, "and the pannel *not guilty* of the murder or culpable homi- "cide libelled." Speaking of ſuch a queſtion, as applicable to the law of England, Sir Mathew Hale has ſaid, "That "if a jury return a ſpecial verdict finding facts, and alſo "draw a concluſion from them, the Court may judge of the "facts, and diſregard the concluſion, if it is a wrong one in "point of law." But, although there is much to be ſaid in ſupport of the opinion here delivered by that great lawyer, yet are there conſiderations on the other ſide alſo. I mean, however, only to propoſe this point to the reader, for his own reflections, and do not aſpire to decide a queſtion of ſuch difficulty, and ſuch importance; and with reſpect to which, as it has never yet occurred in practice, ſo it is rather to be wiſhed, that no occaſion may ever happen to conſider it at any future time.

Vol. i. p. 471.

THERE is a third, but I think not ſo nice a queſtion, relative to the powers of the Court, in the caſe of a verdict which makes a return of certain facts as proved, and draws a general concluſion from them, but ſpecifies an inſufficient ſort of evidence, as the ground of their opinion. As for inſtance if the aſſize "find the pannel guilty of the murder libelled, in "reſpect of the poſitive depoſition of *one* creditable wit- "neſs, who deponed he ſaw the mortal ſtroke given by the "pannel." For though the error here be in point of law, yet it is the ground of a concluſion in point of fact, which is the proper buſineſs and province of the jury; and which concluſion they have nowiſe referred to the Court, but have made

Special verdict returning an unlawful mode of proof.

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for themſelves. I cannot therefore think, that their verdict is invalidated by the expreſſing of a bad reaſon; for it is our opinion of the ability only or intelligence of the men that is ſhaken in ſuch a caſe, and not our belief in their verdict, as a true and conſciencious report of their own ſentiments on the caſe. The proper remedy in thoſe rare ſituations of injuſtice done by a jury, ſeems rather to lie in the royal mercy; whereby the wrong in the particular caſe may be redreſſed, without any riſk of injury to this delicate and intereſting part of our law. I know not, whether, in illuſtration of this doctrine, I ſhould here quote the verdict in the caſe of Hay and Thomſon, accuſed of murdering by poiſon, which is thus: "Find the pannel David Hay guilty in the terms "of the libel, by adminiſtering poiſon to Helen Langrig his "ſpouſe, *of which, by the common report of the country, ſhe lan-* "*guiſhed and died;* and alſo finds the pannel John Thomſon, "commonly called Dr Thomſon, guilty of having furniſhed "the ſaid David Hay with the poiſon adminiſtered, and there- "fore by plurality of voices finds him guilty of airt and "part." At firſt ſight, the jury ſeem here to reſt their belief of the death of the deceaſed by poiſon, on no better authority than common fame; but perhaps it is the juſter conſtruction of their words, though certainly not very correct, that ſuch was the univerſal opinion of all who had acceſs to know any thing of the matter. Theſe pannels had judgment accordingly, as convicted of murder.

Mar. 16. and 17. 1692.

IT does not however follow from what has now been ſaid, that the Judge is equally bound to give effect to the deciſion of the aſſize, though they put their verdict on ſuch a ground as is denied and falſified on the face of the record, or make reference to the record for ſome

mean

mean of evidence, which exiſteth not there. Unlikely as it may ſeem, in truth ſuch a caſe did once occur. In April 1798, Janet Ramſay was indicted at Jedburgh, for child-murder, and ſhe pleaded *not guilty* to the charge. The aſſize, however, found her guilty *in terms of her own confeſſion;* wherein they referred probably to a previous *declaration*, which ſhe had emitted before a magiſtrate, very unfavourable certainly to her cauſe. Now here the Judges were unanimouſly of opinion, that the verdict was fruitleſs and inept, as grounded on that which was contradicted by the very record of the trial, and referring the Court to a mean of information which exiſted not.

July 3. 1798.

I SHALL now have nothing more to add on the ſubject of this chapter, when I have ſaid that a verdict is good, though it fail to exhauſt the whole points of the libel, or even to make an anſwer with regard to all the pannels. It is only in appearance, and according to the form of words, that ſuch a verdict is defective: For it is the conſtruction of our practice, in regard to all the charges or perſons omitted, that the ſilence of the verdict is the ſame as an acquittal. In the caſe of Murdiſon and Miller, the verdict took no notice of one of the charges; and the objection taken to it on that ground, was repelled. In the trial too of William Paton, David Black and others, for a riot, the verdict being ſilent as to Paton [1], the Lords, for that reaſon, aſſoilzied him *ſimpliciter*, and diſmiſſed him from the bar.

Verdict good, though it do not exhauſt the libel.

Maclaurin, No. 89.

May 25. and 26. 1720.

[1] "In reſpect, there is nothing found proven by the ſaid verdict againſt William Paton, aſſoilzie him *ſimpliciter*, and diſmiſs him from the bar."

CHAPTER XVII.

OF SENTENCE AND EXECUTION.

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WE have now reached the concluding ſtep of a criminal proceſs, the ſentence; which is the act of Court, pronounced in purſuance of the verdict, and applying the law to the fact which has been found by the aſſize.

Time of proceeding to ſentence.

IN this matter, the Court may either proceed forthwith on receiving the verdict, or they may adjourn for that purpoſe, at their pleaſure, to ſome later day. If however they chooſe to proceed, and the proſecutor move them to that effect, it will then lie with the pannel immediately to propoſe his reaſons, if he any have, in arreſt of judgment. For although the Court may if they pleaſe, and always will when it is proper, allow his counſel full time farther to enforce and ſupport any plauſible objection which has once been ſtated; yet it cannot be aſked as matter of right, to give a delay for the purpoſe of ſcrutinizing the verdict, and ſearching for flaws, where none can be diſcovered at the time. Such a motion was overruled in the caſe of Nairne and Ogilvie; where,

Aug. 14. 1765.

throughout

throughout the trial, the counſel for the pannels had conducted the defence in too zealous a faſhion, and one which was ſomewhat diſreſpectful to the Bench. On their moving to be allowed ſome time to digeſt and prepare reaſons of exception to the verdict: "The Lords, &c. having conſidered the "foregoing debate, declare that they will proceed to give "judgment upon the verdict, unleſs the procurators for the "pannels will forthwith ſtate ſpecial reaſons in arreſt of "judgment." If ſuch reaſons are pleaded, it is alſo in the option of the Court either ſtraightway to diſpoſe of them, or to name a day for deliberating on the ſubject, and make an order, if they ſee cauſe, for laying the debate before them, in ſome written ſhape, for their more mature conſideration.

Sentence abſolvitory. Form of it.

I. SENTENCE is of two ſorts, abſolvitory or condemnatory, according to the lawful conſtruction of the verdict which has been returned. And of the former the eſtabliſhed tenor is, to aſſoilzie the pannel, and ordain him to be diſmiſſed free from the bar; ſo as he may not again enter the walls of a priſon, or be expoſed to detention for gaol fees, or on any other account or pretext whatſoever. It is true, that in our older practice, and even for a while after the new eſtabliſhment in 1671, the form does not ſeem to have been uſed, of inſerting in the record any act or deliverance of the Judge, ordaining the pannel to be diſcharged on his acquittal. But this, without a doubt, was a ſlovenly and an irregular practice. For it belongs to the Court alone to apply the verdict to the charge, and declare the iſſue of the accuſation, how ſimple ſoever the inference may be; and till this be done, the pannel remains in his ſtate of commitment, to which as he was conſigned by the written warrant of a magiſtrate, ſo he cannot regularly be relieved from it, but by

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a written entry on record. Hence too, it comes, that although the pannel have a verdict in his favour, as far as relates to the particular charge which has been tried; yet if the profecutor ſtraightway apply for a freſh warrant againſt him, as on ſome new or ſeparate charge, the Court will verbally order him to be detained at the bar, though the ſentence of abſolvitor have even been ſigned, in the time of reading the petition for his recommitment. Nay, on cauſe ſhown, they will even give the like order, for ſuch a time as is neceſſary towards preparing the petition to recommit him: For it would not be reaſonable, that the magiſtrate ſhould releaſe and diſmiſs a perſon, who, in this public and judicial, though verbal ſhape, is charged before him with a crime. Some diſcuſſion took place on this head, though with relation to a different period of the proceſs, in the caſe of Macintoſh of Aberardour [1]; where, for

Nov. 1729.

certain

[1] This is given on the authority of the Notes written by Mr Charles Areſkine, (afterwards Lord Juſtice-Clerk), on the back of the libel in his collection of papers in criminal caſes. The words are as follows: "This day the pannels "were brought to the bar, that were in priſon, and the others appeared, and "gave in a petition to be relaxed, whereupon new criminal letters were execu-"ted againſt them at the bar, the ſame verbatim with the former, only ſome "more witneſſes were added, and then the diet was deſerted as to the firſt libel, "and a petition moved for a warrant of commitment. The procurators for the "pannels had urged before deſerting of the diet, that the ſaid petition could not be "moved, in regard the pannels were ready at the bar to ſtand their trial; that it "was vexatious to have new criminal letters executed againſt them, *verbatim* the "ſame, on purpoſe to vex them by the *ſqualor carceris*, and to elude the effect of "the letters of intimation. To this it was anſwered, that it had been the practice "in ſome former caſes, that more than one libel was executed for the ſame "crime againſt the ſame perſons; that it was true, when the purſuer inſiſted in "any one of them, he behoved to deſert the diet as to the reſt; and for proof of "this an appeal was made not only to the caſe of Mr James Dundas of Arniſ-

"ton,

certain reaſons, the proſecutor moved the Lords to deſert the diet of his indictment; and then, having ſerved the pannels with a new one at the bar, he applied for a warrant to recommit them. They maintained, that, on the contrary, they had right to their immediate diſmiſſion, and could not be detained on a verbal order of the Court, during the time even of reading the petition for their commitment. The Lords, however, thought otherwiſe; and after detaining them at the bar, till the petition was read and conſidered, gave warrant of commitment in common form.

Benefit of ſentence abſolvitory.

THE prime benefit of a ſentence abſolvitor is, that the pannel can never again be challenged or called in queſtion, or made to *thole an aſſize* (as our phraſe for it is), on the grounds of the charge which has been tried. The foundation of which maxim, lies in this humane and obvious conſideration, that

" ton, younger; but likewiſe to the caſe of Colonel Charteris, when purſued for " a rape: Nevertheleſs, the proſecutor, in the preſent caſe agreed to the de- " ſerting of the diet upon the firſt libel, and then moved his petition. Where- " upon the pannels' procurators urged, that by the law they were to be diſ- " miſſed immediately from the bar, and could not be detained even while the " petition was reading, and the warrant ſigned; and that it was not in the " power of the Court, by a verbal order, to abridge the liberty of any ſubject. " To this it was anſwered, that when any man was accuſed for murder, he might " be apprehended, and detained in the ſtreets, and brought before a Judge, and " kept into cuſtody until a warrant could be ſigned, not only when he was " *deprehenſus in flagrante crimine*, but even after he had abſconded, and after- " wards appeared: That criminals could not poſſibly be apprehended otherwiſe, " unleſs there were numberleſs warrants iſſued out againſt them. Upon this de- " bate, the Lords ordered the macers to detain them at the bar, adviſed the peti- " tion, and ſigned a warrant of commitment for all the pannels. His Majeſty's " Advocate agreed to admit one of them, namely, Major Macintoſh, becauſe of " his advanced age, to bail, which was accordingly done."

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No one tholes an aſſize twice.

that a perſon is ſubſtantially puniſhed, in being twice reduced to ſo anxious and humiliating a condition, and ſtanding repeatedly in jeopardy of his life, fame, or perſon. Not only therefore does the rule hold good of a new proſecution at inſtance of the ſame, but even of a different accuſer, if it be laid for the ſame concluſions: That is to ſay, with reſpect to the party injured, and the Lord Advocate, that neither of them can inſiſt for the pains of law, or atonement to the public, if the pannel has already been acquitted in a proſecution for thoſe pains, at inſtance of the other. In thoſe ſituations alſo, of which there are a few, where a perſon is liable to proſecution at inſtance of a number of individuals; for inſtance, all the freeholders of a county, in caſes of perjury in taking the oath of truſt and poſſeſſion; certainly he cannot be made to undergo ſucceſſive trials for the ſame act of perjury, at inſtance of as many of them as may chooſe to haraſs him in this ſort, but ſhall have his *quietus* on acquittal in the firſt proſecution, at inſtance of one of them only. As little will it vary the rule, that the new proſecutor chooſes to alter the ſhape of the former charge, and lay his libel for the ſame facts, under a new denomination of crime; ſtating them as fraud perhaps inſtead of theft, falſehood inſtead of forgery, or as aſſault and riot, inſtead of deforcement of the revenue-officer, or the like. The Judge will not ſuffer the law to be evaded on ſuch eaſy pretences; but will look to the ſubſtance of the caſe, and the ſituation of the pannel, who ſtill is proſecuted twice for the lawful pains of the ſame act.

Maxim of not tholing an aſſize twice, applied.

BUT, what does the law pronounce on the oppoſite caſe, where the ſecond proſecution is not only at inſtance of a new accuſer, but is brought for a different purpoſe? That is to ſay, may the private party raiſe his libel in the Court of Juſticiary,

Juſticiary, for damages and reparation, notwithſtanding the previous abſolvitor of the party, on an indictment there at inſtance of the Lord Advocate, concluding for the pains of law? Or ſhall it hinder the Lord Advocate from inſiſting againſt any one for his Majeſty's behoof, that the man has already had his acquittal in the Court of Juſticiary (for there is no plea if the trial have been elſewhere) in a proſecution, if ſuch be competent there, at inſtance of the party injured, for his peculiar and private intereſt only? Both of theſe are ſpeculative queſtions, on which, as far as I know, our Judges have never had occaſion to decide. But with regard to the latter, it may deſerve to be conſidered, that the Lord Advocate gives his concourſe to the libel of the private party for his damages; and it may ſeem not unreaſonable to infer, that on his being thus made acquainted with ſuch a charge, and obliged ſo far to take a part in it, he is bound fully to learn and duly to conſider the nature and whole circumſtances of the caſe, and to take his definitive reſolution, whether, along with his concourſe to the individual complainer, he will not give his inſtance alſo for his Majeſty's intereſt, and thus at once bring the whole matter to an iſſue. In doing otherwiſe, and thus dividing his character, he may ſeem to take an unfair advantage of the accuſed; not only in putting him to the expence and diſtreſs of repeated trials, but alſo, becauſe the evidence and proceedings in the firſt one, ſerve as an inſtruction towards the better laying, ordering, and conducting of the ſecond, ſo as the more fully to enſure its ſucceſs.

This laſt objection applies alſo, in ſome meaſure, to the former queſtion. Theſe things muſt however be weighed on

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the other ſide: That the private complainer may not know of the Lord Advocate's proſecution, and at any rate cannot force that officer to admit him as a party to his libel: That here the more anxious and important intereſt is diſpoſed of in the firſt place; and that weaker evidence may ſerve towards a conviction which tends to damages only and reparation. But on neither of theſe queſtions do I mean to give an opinion (as indeed it is not clear that any ſuch pure action of damages is competent in the Court of Juſticiary at all) but only to point them out as ſubjects of inquiry to the ſtudent.

Res judicata muſt be in a fair and regular trial.

WHATEVER may be thought of theſe points, it is clear, that the pannel can only have advantage of the maxim above mentioned, ſo far as his abſolvitor has been obtained in a fair and regular proceſs, truly intended to anſwer the purpoſes of juſtice, and not to ſcreen him from puniſhment, under colour of a previous trial. Thus, John Wallace was indicted at inſtance of the Lord Advocate, for aſſaulting and abuſing an officer of the revenue. But, for this offence, ſaid he, I have already been tried and acquitted, on a complaint at inſtance of the procurator-fiſcal of Forfarſhire, to the Juſtices of the Peace for that quarter. In anſwer, beſide other reaſons, the proſecutor affirmed that this had been a mere colluſive trial, truly intended to ſerve the priſoner as a protection from the due conſequences of his crime. Accordingly, the Lords paid no regard to this pretended *res judicata;* aud found the libel relevant to infer an arbitrary puniſhment, damages and expences. The like plea was ſet up in the caſe of Janet Macrachan and others, indicted for a riot; who objected, that they had already been called and aſſoilzied,

Jan. 26. Feb. 9. 1730.

Dec. 26. 1758.

affoilzied, in a complaint on the ſame grounds, before the magiſtrates of Dunbar. It was anſwered, that no extract of any ſuch decree was produced; and that at any rate this had been a mock trial, contrived at the deſire, and for the benefit of the perſons accuſed. "The Lords repel the defence of "*res judicata* as opened for Janet Macrachan, and find the "ſaid libel relevant," &c.

Caſes where a ſecond trial is lawful.

BEFORE I diſmiſs this head, I will add one caution more: that the maxim of not tholing an aſſize twice, is not to be underſtood as applicable univerſally to every caſe where a verdict has been found by the aſſize, or has even paſſed on record. For, what if it be diſcovered that a minor has ſerved on the aſſize, as happened in the caſe of Menzies, in December 1790; where the conviction was for that reaſon ſet aſide, and the pannel was remitted to be tried anew? And much the ſame caſe it ſeems to be, if only fourteen perſons have been named of the jury, (if ſuch a thing could happen); or if one of the fifteen have withdrawn on being ſworn, and never have returned; or if ſome ſtranger have perſonated a juryman, and officiated throughout the trial in his ſtead. In all theſe ſituations, the whole proceedings ſeem to be fundamentally void, in like manner as if no aſſize had ever been named; and therefore a juſt aſſize muſt be named anew; or rather, the trial muſt begin again, as from the firſt. In ſuch caſes, a verdict convicting the pannel, would certainly be null; and it ſeems difficult to hold any other doctrine, when the iſſue is in his favour; for it is equally his concern, as that of the proſecutor, to ſee that the aſſize be regular and juſtly compoſed, and he has equally a control of the proceedings in that reſpect. Other ſituations may be imagined, which muſt come

CHAP. XVII.

to the ſame iſſue. For what if, by ſome accident, the verdict ſhall be loſt in the hands of the chancellor, or if he ſhall produce it ſo torn and defaced, that the contents cannot be read? Or again, as happened in the caſe of Thomas Hall, ſuppoſe that a verdict is returned (if this be a good objection) which does not ſpecify the name of the pannel. From the very nature of his plea in arreſt of judgment, the pannel cannot ſay in ſuch a caſe, that he has ever tholed an aſſize at all; and he is therefore ſtill liable to be tried; as Hall accordingly was, and ſuffered a conviction in his ſecond trial. I will not, however, enlarge any farther in the conſideration of rare caſes ſuch as theſe, which it may ſuffice juſt to have mentioned, by way of caution.

Jan. 12. Feb. 6. and 16. 1789.

July 20. and 21. 1789.

Caſes where ſecond trial is lawful.

NEITHER will it be neceſſary for me, to reſume what was ſaid formerly, of the conſequences of an adjournment of the aſſize, in thoſe extraordinary ſituations where their ſitting cannot poſſibly be continued. In truth, the maxim above mentioned has no relation to ſuch circumſtances; for the perſon has never tholed an aſſize, in the eſtimation of law, againſt whom no verdict has ever paſſed on record. And if, on ſuch an occaſion, the aſſize, miſunderſtanding the law, ſhall reaſſemble, and make up and offer to return a verdict, it ſeems to be equally competent for either the proſecutor or the pannel, to ſtate the fact as an objection to its being received. If the Judge, being in the knowledge of the fact, ſhall nevertheleſs recognize them as a jury, and give his ſanction to this irregular proceeding, by allowing the verdict to paſs on record, as happened in the caſe of Ronald; then indeed, the proceeding falls under the enactment of the ſtatute 1587, c. 92., and the pannel ſhall have right to his final abſolvitor from the charge. But it is not in the power of the aſſize, by any ſe-

parate

parate and unauthoriſed proceeding of their own, to regenerate themſelves, and recover a ſtate of exiſtence as an aſſize, which, according to law, was, by their diſperſion, entirely at an end.

Of ſentence condemnatory.

II. I COME now to ſpeak of ſentence condemnatory, ſuch as paſſes on a verdict which affixes ſome ſtain of guilt to the pannel.

Both parties muſt be preſent.

IN this, as in all the other ſteps of proceſs, one thing is eſſential towards the advancement of the trial, viz. That both parties be perſonally preſent in Court; the proſecutor to move for ſentence, and the pannel to hear and undergo it. To inflict puniſhment on any one, the Court muſt be conſtrained by a demand made on their juſtice; and even at this laſt ſtage of the trial, it will be held that the proſecutor relents, and has deſiſted from his inſtance, unleſs he appear perſonally to urge it on to a concluſion. The pannel too, as has more than once been mentioned, notwithſtanding the litiſconteſtation by the taking of proof, and his conviction by a verdict of his peers, is not even in this ſituation cut ſhort of the objections, which, if preſent, he might poſſibly ſtate (ſo the law humanely ſuppoſes) to the paſſing of judgment againſt him; and ſo he is ſuffered to eſcape, whatſoever be the degree of his crime, with an ordinary ſentence of fugitation, which has no other effect, than if it had paſſed at the firſt calling of the libel.

Neceſſity of the pannel's preſence.

LET me ſay farther, that in ſpeaking of the pannel's preſence, as neceſſary towards paſſing judgment againſt him, I do not mean that he has a diſpenſation from attendance, when the verdict is in his favour. That the proſecutor ſhould attend

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tend on that occaſion, there ſeems indeed to be no reaſon; ſince he has nothing to crave of the Court. But as to the pannel, certainly his obligation to underlie the law, continues till the final iſſue of the proſecution; which he is not in any inſtance entitled to anticipate, how ſimple ſoever the caſe may ſeem to be: and if, at this laſt ſtep of proceſs, he fail of the due reverence and ſubmiſſion to the laws, by withdrawing his appearance, the Court will not proceed to aſſoilzie and diſcharge him, for he is not in their cuſtody, but will continue the diet only till another day. Nay, if ſo ſtrange a thing ſhould happen as his proving obſtinately contemptuous, and utterly refuſing to appear, they may even, for aught that I can ſee, proceed to fugitate him, as if no trial had taken place.

Pannel muſt be ſober.

THE pannel muſt not only be preſent with his perſon in Court, but in that due ſtate of ſobriety alſo, and poſſeſſion of himſelf, which are requiſite towards conducting this ſolemn part of the trial with decency, and with hope of benefit to the audience. If, therefore, he appear to be intoxicated (as happened in the caſe of Maccuillin in 1797), the Court will adjourn the diet, and take order for keeping and preſenting him, in a ſtate of mind more befitting his unfortunate condition. Or if he ſeem to be diſordered in his ſenſes, ſentence ſhall in like manner be delayed from time to time, that it may be aſcertained whether his diſeaſe be real or affected, and whether it be fixed and incurable, or an occaſional derangement only, of which he may be expected to recover. Such an objection was ſtated, at receiving the verdict in the trial of Thomas Gray; and the diet was in conſequence adjourned from time to time, till at laſt, if I miſtake not, the caſe dropped

Aug. 3. 1773.

out

out of the record: at leaſt, I have not been able to diſcover, that it came to any iſſue.

Caſe of pregnancy of a female convict.

ANOTHER ſituation which requires a delay of paſſing judgment in capital caſes, is that of a female convict who is pregnant; leſt her child periſh with her, and becauſe it cannot be known with certainty, at what time her delivery ſhall take place. Upon any allegation of this ſort, (and I do not find that any diſtinction has ever been made, whether the woman were with quick child or not), the Court will order a report on oath of ſkilful perſons, who ſhall viſit the pannel, and verify her condition; and if their report be doubtful on their firſt viſit, they may be ordered to ſee her again, from time to time, and to report anew by a certain day, to which the diet for pronouncing ſentence may be adjourned. This courſe was taken in the caſe of Katharine Nairne, in Auguſt 1765, and in that of Mary Langlands, on the 17th November 1785 [1]. In this laſt inſtance, the reſpite was given by the Lords Hailes and Henderland, the only two Judges who were in Edinburgh at the time; and their deliverance bears, that as no quorum of the Court could be got, they therefore proceeded on the neceſſity of the caſe.

Form of pronouncing ſentence.

THE form of giving forth the ſentence, has altered in modern times, from what it was of old. In caſes not capital, the uſe had been, that it was read out by the clerk of Court from the record, and was repeated after him, by one of the macers,

1 Execution was delayed on account of the pannel's pregnancy, long ago, in the caſe of Helen Geddes, convicted of inceſt; March 2. 1658. This on authority of the Abridgment of the Records in the Advocates' Library; for the original record has periſhed.

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cers, to the pannel. In capital caſes, with an attention which ſavoured of barbarity, the office of repeating the ſentence was devolved on the dempſter (as he is called) or common executioner. This rude ceremony, was aboliſhed by Act of Adjournal of the 16th March 1773, which orders that the ſentence ſhall be pronounced by the preſiding Judge, and afterwards read out by the clerk, from the record; which is ſigned in this part, contrary to what is obſerved in the other ſteps of proceſs, by all the Judges who are preſent. Like all the other interlocutors and deliverances of Court, it runs not only in the names of the Lords Commiſſioners of Juſticiary, but ſpecially of the Lord Juſtice-Clerk, or Lord Juſtice-General, if preſent; which ſtyle has, however, been introduced only in later times.

Doomſter.

Sentence fixes the time of execution.

THERE has been a variation of practice, in the article alſo of naming a time for execution of the doom. It is only in the courſe of the preſent century, that any ſpecial order on this head has come to be a neceſſary article of the ſentence: For, according to the older ſtyle, the time was left quite at large, to the will of the inferior magiſtrate; and it appears, that not uncommonly [1], this diſcretion had been carried the length of executing the ſentence on the very day that it was given. This happened in the caſe of Lady Glamis, July 17. 1537; of Hackſtoun of Rathillet, in 1680; of Baillie of Jarvieſwood,

[1] According to a Note, 24th January 1624, in the MS. Abridgment of the Books of Adjournal, the ordinary courſe was to proceed to execution on the day after the ſentence. I find this entry in the Diary of Robert Birrell, burgeſs of Edinburgh, who ſeems to have been an exact obſerver of incidents of this nature: "The 8th of Februar (1597), Johne Windiezetts, Johne Moſcraip, Alexander "Lowrie, John Halliday, and Captain James Lowrie, all hangit at the Croſſe, "for counterfeiting fals wreittis, quilk was grate pitie to ſie." It appears from the Book of Adjournal, that their ſentence had been pronounced that ſame day.

vieſwood, in 1684; and Richard Rumbold, in 1685[1]. Nay, by the expreſs appointment of the law, a murderer taken in the fact, or *red-hand* as it is called, was to be tried and executed by the Sheriff within three ſuns; and by the ſtatute 1695, c. 4., this precipitation was only ſo far corrected, as the time of execution was now left to the diſcretion of the Judge, not exceeding nine days after ſentence. There are, however, obvious reaſons in the ſituation of Scotland, a country ſo remote from the ſeat of mercy, not to mention other very powerful conſiderations, why a more definite rule ought to be preſcribed on this head, and the unhappy convict be allowed a longer interval between his doom and execution. Yet no proviſion was made in this behalf, before the 11th of Geo. I.; when, among other ſalutary regulations, thrown into the ſtatute of that year for diſarming the Highlands, it was ordered that no ſentence of corporal pains, ſhould be executed within leſs than thirty days after its date, if pronounced to the ſouthward of the Forth, nor within leſs than forty days, if pronounced to the northward of that river. As far as concerned the inferior corporal puniſhments, ſuch as ſcourging or pillory, this long delay of execution was found troubleſome, and a diſcouragement to the trial of petty offenders: And it was therefore abridged by ſtatute 3d Geo. II. c. 32., which allows the inflicting of any puniſhment ſhort of death or demembration, after the expiration of eight days, or of twelve days, from the date of the judgment, according as

Statutory limitation in that reſpect.

11. Geo. I. c. 26.

[1] Sir Thomas Hope, in his Major Practics, makes mention of an act of Council in 1604, againſt the ſudden execution of ſentence; but this ordinance, if in truth any ſuch was ever paſſed, does not ſeem to have been complied with in practice; and indeed it only enjoins to delay till next day, or longer if the Judge ſee cauſe. See Royſton's Notes, *ad p.* 289.

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as it is pronounced to the ſouthward, or the northward of the Forth; ſaving always the privilege of applying to the Judges of the Court of Juſticiary, who, or any of them, may ſtay the execution of any ſuch ſentence of an inferior Judge, for the ſpace of thirty days, if there be cauſe for ſuch an interpoſition.

What if the ſentence name a wrong day.

In conſequence of theſe regulations, it is now a part of every judgment of corporal pains, to name a day when it ſhall be carried into execution. But, if in this article the Supreme Court fall into any miſtake, it is not accounted of that moment, to annul the ſentence and releaſe the convict; being committed in what is only an accident or circumſtance, and not of the ſubſtance of the jndgment, and is held therefore to be ſubject to their own reviſal and correction [1]. Thus, on the 3d June 1731, the Lords Newhall and Royſton repreſented to the Bench, that, on the Circuit Ayre at Perth, they had named the 23d June for the execution of Janet Hay; which being within the time required by the ſtatute, they therefore moved for an alteration of that order, to the 7th of July. This appointment was made accordingly. The like was again done on the 30th of June 1784. The Juſtice-Clerk took notice, that on the Circuit Ayre at Glaſgow, he and Lord Hailes had ordered James Jack for execution there on Wedneſday the *2d*, by miſtake for Wedneſday the *7th* of July: Whereupon, the Court rectified this inaccuracy, and ordered the ſentence to be executed

[1] See Fountainhall, 4th September 1684. Gordon of Earlſton having attempted to break gaol, it was debated, whether for this aggravation of his crime, the Privy Council might not haſten the time of his execution. "But they found "the breach of priſoun was not death, but only baniſhment, by law."

ted on Wedneſday the 7th of July. The like interpoſition would be allowable, if an execution ſhould inadvertently be fixed for any day of public faſt, or thankſgiving; or if the day named for execution, ſhould afterwards be appointed for any ſuch national and religious act[1].

Power to reſpite, or alter time of execution.

BESIDE theſe, there are ſeveral other ſituations, in which, for the furtherance of juſtice, or on other urgent conſiderations, the convict muſt have a temporary reſpite; or a change muſt be allowed of the day at firſt named for his execution. For what if a capital convict ſhall fall into a ſtate of furioſity after ſentence? Is it to be imagined, that the Court will allow him to be executed in a ſituation ſuch as this, which diſables him to attend to his ſpiritual concerns, and where his

1 It is here to be obſerved, that this power of rectifying a ſentence as to the time for its execution, is the peculiar privilege of the Court of Juſticiary, reſulting from the ſupremacy of its ſituation, and does not belong to any of the inferior Judges. This is exemplified in the caſe of Adam Mackay, July 30. Auguſt 25. 1796. On Tueſday, the 19th of July, this man had received ſentence in the Sheriff-court of Edinburgh, to be ſcourged on Wedneſday the 27th of the ſame month, being the *eighth day* from the date of the ſentence. This having been obſerved on the part of the convict, he offered a petition to the Sheriff, praying to be entirely relieved of that part of the ſentence, as contrary to the ſtatute of the 3d of George II. which forbids any corporal puniſhment to be inflicted till "after the *elapſing of eight days*" from the date of the ſentence. The Sheriff refuſed to recall his ſentence of whipping; but fiſted execution thereof till Wedneſday the 3d of Auguſt. The priſoner then applied to the Lords of Juſticiary by bill of ſuſpenſion: Which coming to be adviſed, with anſwers and replies, on the 25th Auguſt, the Lords "ſuſpend the ſentences of the Sheriff complained "of, ſo far as reſpects the puniſhment of whipping." From this judgment, it does not however neceſſarily follow, that the Lords of Juſticiary might not have rectified the ſentence, if the *proſecutor* in the inferior court, on obſerving the inaccuracy, had himſelf made application to them, in due time, for that purpoſe.

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death would ſo ill ſerve any of the purpoſes, for which the ſpectacle of public puniſhment is appointed by the laws. It may happen alſo, that in this interval, a woman under ſentence of death is diſcovered to be pregnant. Or it may happen that a woman is delivered, or falls into ſome dangerous and grievous illneſs, ſhortly before the day named for her undergoing her ſentence of ſcourging, or the pillory, or the like; ſo that it cannot be executed without danger of her life. Or again, there may be reaſon to believe, though it is not certainly known, that a pardon is on its way for the convict, and ſhall ſpeedily arrive. Or what if it be diſcovered, that the convict is entirely innocent of the charge? In none of theſe ſituations, will juſtice or humanity allow the magiſtrate to proceed to execution. And now that the Scots Privy Council are ſuppreſſed, who formerly interpoſed on ſuch occaſions, the power of giving relief, naturally devolves to the Lords of Juſticiary, the ſupreme authority in criminal affairs, to the hinderance of a cruel, or

Nov. 27. 1736.

unjuſt, or indecent execution. Rachael Rodger, a woman condemned to die by the regality court of Glaſgow, obtained therefore a reſpite from the Lords of Juſticiary; having ſet forth and verified with evidence, that ſhe

Nov. 17. 1785.

was pregnant. On the like allegation, Mary Langlands, got a reſpite; even though the reports produced with her ſupplication, did not fully aſcertain whether ſhe were truly

Nov. 18. 1790.

pregnant or not. Again, on the petition of Sarah Robertſon and the magiſtrates of Perth, ſetting forth that ſhe is ſeven months gone with child, and cannot without danger undergo her ſentence of ſcourging, the Lords give order to delay the execution thereof, for the ſpace of forty-two days after her delivery. As alſo, on 3d March 1790, William Tenant obtains a reſpite till the 24th of that month, on the ſuppoſition

ſition that the report made by the Judges on his caſe had not yet been laid before his Majeſty.

Power to alter the time of execution.

THE like power reſults to the Supreme Court, in all thoſe caſes where a variation of the firſt ſentence becomes neceſſary, owing to the act of the pannel himſelf: whether it be his unlawful act, in making his eſcape from gaol, being reſcued at the gallows, or uſing ſome undue artifice to delay his execution; or his lawful act, in ſeeking review of his ſentence, in courſe of law. It is not be imagined, that, in the firſt caſe, he can avoid his appointed doom, by his own contemptuous or unwarrantable enterpriſe. And, in the other, as the day firſt named by the inferior Judge, is allowed to paſs at the prayer of the convict, and on his account, that his plea may be heard and deliberately tried; ſo the Court of Review, derive from thence a power to name a new day for execution of the ſentence, if in the end it ſhall be affirmed. This was done in the ſuſpenſion at inſtance of John Finlay and Jean Watſon, in July 1739[1]; and in James Smith's caſe, Feb. 16. 1753; and in Lyel's caſe, Jan. 17. 1754. Of the other ſituation, ſeveral inſtances were mentioned in a former chapter; to which let me add now the caſe of William Gadeſby, who, on the petition of the Lord Advocate, obtained a reſpite from the Court of Juſticiary, under the falſe pretence of having certain important diſcoveries to make; and afterwards raiſed a plea on this indulgence, to hinder the naming of a new day for.

July 13. 1739.

Feb. 2. and 15. 1791.

[1] "Refuſe the deſire of the within bill, and in regard the day on which the "within ſentence ſhould have been put in execution, is now elapſed; they, in "regard thereof, ordained the within ſentence to be put to full execution upon "Thurſday the 14th day of Auguſt next to come."

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for his execution. But no regard was paid to ſo unreaſonable an objection.

What if day of execution is allowed to paſs.

It is a different ſituation from any of theſe, that of a lawful ſentence being given, and the day of execution being allowed to paſs, owing to overſight or inattention only, on the part of thoſe to whom the care of this matter has been committed. Now, whether it be that the magiſtrate has miſtaken the day, or forgotten the buſineſs entirely, or has found difficulty of making the neceſſary preparations to obey the warrant; ſtill the convict, who is nowiſe to blame in the matter, has the advantage of this failure, in the complete protection of his perſon. For the day of execution named by the Judge, is a limitation of his ſentence: and not only the Sheriff or other magiſtrate, cannot, without the guilt of murder, carry the doom into effect on any later day; but even the Supreme Court, by the expiration of that term, without any cauſe having been ſhown to them why they ſhould name another day, are abſolutely diſcharged of their office as to that caſe; and never can give anynew order with regard to the convict, but for his liberation from gaol, as one who is now detained there without a warrant or lawful cauſe. In this view, Lord Royſton takes notice of the caſe of one Fleming, who eſcaped his appointed doom for forgery, owing to an error of the magiſtrates of Edinburgh; who delayed to execute him on the day preſcribed in his ſentence, as being afterwards appointed for the obſervance of a public faſt, and yet neglected to apply to the Lords of Juſticiary, to name another day of execution. The man continued in gaol for ſome time; and it was at length judged prudent to ſolve the difficulty, with a free pardon. In the ſame view, I may refer to the application for Charles Graham; who had been baniſhed from

Notes, *ad p.* 291.

from Scotland, by ſentence of the Court of Juſticiary, under certification of being ſcourged in caſe of return, upon the *firſt market day* after his re-commitment to the gaol of Perth. Having, however, returned to Scotland, and been impriſoned in the gaol of Perth, but not having been ſcourged, in terms of his ſentence, on the *firſt* market-day after his commitment, he applied by petition to the Judges on the Circuit, inſiſting that no ſuch puniſhment could now be inflicted on him, and praying therefore to be ſet at freedom. This matter was remitted for the opinion of all the Judges; and after an argument at the bar, the Lord Advocate judged it prudent to prevent a deciſion, by conſenting to the petitioner's deſire. The Lords "having heard parties' procurators fully thereon, "with the minute and conſent of the public proſecutor be- "fore written, they, in this caſe, diſmiſs the petitioner from "the bar, in order that he may obtemper the ſentence of ba- "niſhment ſtanding againſt him."

Nov. 25. and Dec. 20. 1788.

I INCLINE, for my own part, to be of the like opinion with reſpect to a more extraordinary ſituation: that of a capital convict on whom ſentence has been executed, as is ſuppoſed; but who revives after delivery of his body, by the order of the magiſtrates, to his relations. It is true, the ſentence was to hang him by the neck until he were dead; and this has not been done. But that it is not done, is owing to the inattention only of the magiſtrate, whoſe buſineſs it is to ſee that the body be lifeleſs, before he ſuffer it to be carried away; and who cannot of his own authority, and leaſt of all by any want of care on his part, gain a title to aggravate the ſentence, or to extend the limited term for putting it to execution. Notwithſtanding the improbability of ſuch a thing, there is one inſtance of its having actually happened. In 1724, a married woman, named

What if capital convict not executed to the death.

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med Margaret Dickſon, had ſentence of death for child-murder, and was executed, as was ſuppoſed; but revived after being carried from the gallows, and delivered to her relations. And having been reconciled to her huſband, and received into his ſociety, as is reported, ſhe continued to live with him in the city of Edinburgh, unchallenged, for a courſe of many years.

No power to retract or alter ſentence.

As it is thus our rule, that the time for execution of a ſentence, having once been lawfully fixed, cannot be altered but in caſes of neceſſity, or on account of the convict himſelf; ſo is it alſo true, that a ſentence once delivered, cannot ordinarily be varied, retracted, or amended, in other reſpects. Thus, on the 31ſt December 1716, the magiſtrates of Edinburgh applied by petition to Lords of Juſticiary, ſetting forth, that they had been found fault with by the Lords Regents at the time, for failing ſufficiently to execute a ſentence of the Court, which ordered the meeting-houſes of certain Epiſcopal preachers to be ſhut up: Therefore, they pray for new powers and inſtructions, towards carrying ſuch ſentence into effect. Whereupon the Lords "find, That the proceſs brought "before this Court, in June laſt, againſt the perſons within "named, is terminated by the verdict of an aſſize, and the "ſentence pronounced thereupon; and by the form of this "Court, that ſentence of this Court cannot be altered by the "Judges pronouncers thereof; and the ſaid Lords looked on "the ſaid ſentence as containing full warrant for execution of
June 21. 1766. "the ſamin." The deciſion in the caſe of John Grant, is a farther illuſtration of the ſame rule. This man had been ſentenced to tranſportation, in the Circuit Court at Inverneſs. But afterwards, without the knowledge of the Court, he had been ſuffered to enliſt in a regiment then going abroad, and with which,

which, at ſome diſtance of time, he returned to Scotland; where, being apprehended, he was threatened with whipping, agreeably to the certification of his ſentence. He, in conſequence, applied by petition to the Lords of Juſticiary, for relief; pleading, that by means of the inliſtment, his ſentence was virtually departed from and at an end. The Court gave this deliverance: "Find, That as the petitioner never was "tranſported in terms of the ſentence of the Circuit Court "of Juſticiary, he is not liable to be whipped, and prohibit "the magiſtrates of Inverneſs from executing that part of "the ſentence, but find that he muſt now remain in priſon till "he is tranſported, in terms of his former ſentence."

Sentence is irreverſible from its date.

THAT a ſentence cannot be altered or recalled, is true in this other ſenſe, that it is irreverſible from the time of its receiving the ſubſcription of the Judge; without any allowance, as in civil proceſs, of a time for reclaiming, within which the award of Court is accounted an interlocutor only, and not a final decree. Not to mention ſeveral other reaſons, which are ſufficiently obvious, humanity requires that theſe important concerns of fame and liberty, life and perſon, be brought at once to a certain iſſue; and will not ſuffer them to be ſubject to the ſame fluctuation as mere patrimonial intereſts, by repeated trial and judgment. As, however, it would engage in difficulties, to diſtinguiſh in this matter between one ſet of caſes and another, this rule is obſerved equally with reſpect to thoſe ſentences, which inflict only fine or damages, or thoſe parts of a ſentence, which relate to mere pecuniary intereſts. Suffice it to mention in evidence of this well-known rule, the caſe of James Fife, where the Lords refuſed as incompetent a petition for the proſecutor, complain- Dec. 22. 1797.

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ing of the ſentence, as far only as it found him liable in expences.

Relaxations of ſentence in neceſſary caſes.

In this, as in ſome other articles already ſpoken of, any exceptions which have ever been allowed, are to the ſide of mercy, and from motives of humanity; that the convict may not ſuffer more, than was truly intended by his ſentence. In this view, the manner of carrying judgment of tranſportation into effect, has been modified in ſeveral inſtances, to the relief and advantage of the priſoner. As, for example, in the caſe of

Dec. 20. 1725.

the Glaſgow rioters; where, in purſuance of a letter from the Lords of the Regency, the Court ordered the priſoners to be delivered up to the maſter of a certain veſſel, on his receipt, without taking a bond from him, as required in the ſentence, for landing them ſafely abroad. The like in the caſe of Ja-

Jan. 10. 1734.

net Jamieſon, priſoner at Aberdeen, who ſets forth in a petition to the Lords, that ſhe has continued long in gaol, but can find no one to charge himſelf with the tranſportation of her, unleſs on payment for her paſſage, which ſhe has not the means of furniſhing: And therefore ſhe prays to be releaſed, on her own enactment never again to be found in Scotland, under the ſame certification as in her ſentence; which is ordered accordingly. In like manner, on his own petition, ſetting forth that there has been no opportunity of tranſporting him,

July 1. 1735.

Walter Denny obtains leave to inliſt in a regiment quartered at Gibraltar, under proviſion of his officer finding ſecurity to land him there, and report a certificate from the governor of

Jan. 15. 1784.

the garriſon to that effect. Again; James Fullerton, one who had got a pardon under condition of being tranſported, and indented to ſerve the contractor for tranſportation of felons, repreſents to the Court, that there is no contractor for that purpoſe, but that an individual has found caution

tion to tranſport him in particular; and to this perſon, in conſequence of the Lord Advocate's conſent, he is ordered to be delivered, on receipt of his bond of caution. I find, however, that in one inſtance (but I doubt if this was regular), while the mode of execution was relaxed in one particular, it was aggravated in another. Alexander Youngſon had ſentence in a Circuit Court at Aberdeen, to be baniſhed from Scotland for his lifetime, and to lie in gaol till he ſhould find caution not to return. He was afterwards diſcharged on his own enactment to that purpoſe, but under certification, in caſe he returned, of lying in gaol for three years, and till he ſhould find caution to tranſport himſelf to the plantations[1]. Let me obſerve, in connection with this article, that the more preciſe proviſions of our later ſtatutes reſpecting tranſportation, ſeem to render unneceſſary any exerciſe of theſe modifying and diſpenſing powers of the Court, how unexceptionable ſoever they may be in themſelves.

July 8. 1728.

ONE ſituation, however, there is, which may ſtill require the interpoſition of the Judge; that of a perſon under ſentence of impriſonment, who comes to be in imminent danger of his life, in conſequence of his confinement. That he ſhould be ſimply diſcharged on that account, and excuſed the remainder of his term, certainly cannot with any ſhow of reaſon be pretended. But, on the other ſide, as little is it to be imagined, that this ſort of ſentence, the lighteſt of thoſe which anywiſe affect the perſon, may be perverted into an engine for depri-

Caſe of a priſoner in danger of his life.

[1] It appears from the petition of Gabrial Cunningham, (July 3. 1732), that he had received ſentence of tranſportation, under pain of being impriſoned in caſe of return, and whipped on the firſt Wedneſday of every quarter. This had been executed upon him from the 12th July 1731, the time of his recommitment. He is now diſmiſſed on his own enactment to leave Scotland.

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ving the priſoner of his life. I find accordingly, that in ſuch a ſituation, James Fiſher, a perſon under ſentence of impriſonment for five months, had, at the end of the fourth month, and in purſuance of the opinion of phyſicians, ſtating the danger of his life, been removed from the gaol to the infirmary of Edinburgh. On the 22d June 1781, he applies by petition, and verifies with the like evidence, that he continues to grow worſe, and has no hope of ſaving his life, but by removal to a ſituation of free air and exerciſe in the country: therefore, he prays the Lords to diſpenſe with the laſt month of his impriſonment, at leaſt to liberate him on caution to return to gaol, as ſoon as the ſituation of his health ſhall allow. Accordingly, on the conſent of the Lord Advocate, which, though deſirable, does not however ſeem to be indiſpenſable in in ſuch circumſtances, warrant of liberation is given; he finding caution, "that he, upon recovery of his health, ſhall re-"turn to the tolbooth of Edinburgh, and remain therein un-"til the full ſpace of his confinement ſhall be completed."

Of ſentence, or coming in the King's will.

BEFORE I conclude, it may not be amiſs to add a few words touching another courſe of procedure towards ſentence, which has now for a long time been entirely out of uſe; that of the pannel *coming in the King's will.* According to the more correct notions of later times, his Majeſty is underſtood to have no will with reſpect to any pannel, but the will of the law, declared by his Courts of Juſtice, *(voluntas regis in curia, non in camera);* and the only interference of his Royal Perſon in ſuch matters, is for the exerciſe of his gracious prerogative of mercy, which is ſeldom applied for, till after the concluſion of the trial. So it is, however, that many of our old ſtatutes reſpecting crimes, ſeem to recogniſe a right in the Sovereign to take a more direct con-

cern

cern in the adminiſtration of this part of juſtice; in as much as they bear for ſanction, that the offender's *perſon*, and ſometimes the expreſſion is *his life*, ſhall be in the King's will; which will, was therefore to be ſignified to the Court, and proceeded on in paſſing ſentence. Neither was this ſort of interference confined to thoſe ſtatutory caſes only: On the contrary, both in caſes of confeſſion, and conviction by aſſize, it was admitted on many other occaſions, where the law neither referred to his Majeſty's will, nor even left any thing to the diſcretion of the Judge. The royal judgment in ſuch matters, ſeems to have been declared in various forms: ſometimes in a ſpecial warrant, proceeding on the ſubmiſſion of the culprit, and bearing an actual ſentence in purſuance thereof; on other occaſions, in an order to the Court to give ſentence in certain terms; and in ſome, though leſs frequent inſtances, in a previous direction to take trial of the offence, and inflict a certain puniſhment on the pannel, in caſe of his coming in will. Thus, on the 20th September 1622, the Juſtice receives a warrant, relative to the caſe of Henry Kinloch, which directs the Lord Advocate to inſiſt againſt him, and the Juſtice and his deputes to try him, for certain points of theft, and to baniſh him from the realms of England and Scotland, in caſe of his confeſſing and coming in will. Hereupon, having ſubmitted him to the royal pleaſure, Kinloch is ſtraightway baniſhed, "Undir the paine of deid, as he that "became in will, for the theftuous cryme above-written." I have not obſerved, that there is any inſtance of a pannel coming in will, after the reformation of our Criminal Judicature in 1671.

Res judicata by ſentence condemnator.

HAVING now cloſed the inquiry concerning the execution of ſentence condemnatory, ſo far as it is prejudicial to the convict,

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conviƈt, let me next add a few words concerning its operation in his favour, as a defence againſt farther puniſhment or proſecution. On this head, the following particulars may be ſet down. 1. Either the Lord Advocate, or the party injured, having proſecuted in the Court of Juſticiary for the pains of law, muſt be content with the judgment which he obtains there; and can never afterwards moleſt the pannel, with any new proceſs for his farther chaſtiſement. 2. The ſame is true of the private complainer, if he have proſecuted and obtained a conviƈtion before an inferior Judge; although, if the offence be one of low degree, and the iſſue be pecuniary, and if he be diſſatisfied with the eſtimation of his damages and expences, this matter may perhaps be ſubmitted to the cogniſance of the Lords of Seſſion, in a proceſs of reduƈtion of the ſentence. 3. If the Lord Advocate proſecute, and obtain judgment for the pains of law, this ſhall not hinder the party injured from inſiſting afterwards, in the civil Court at leaſt (if ſuch a proceſs is not competent in the Court of Juſticiary) for his damages and reparation. It is true, the civil Judge is not bound to receive the verdiƈt of aſſize as *probatio probata* of the man's guilt; but ſtill the teſtimonies given in the trial will be produced and allowed as lawful evidence, ſo far as they go; though not to the excluſion of new pleas, or additional depoſitions on the part of the defender, whereby to obviate the preſumption againſt him, and invalidate, if he can, his previous conviƈtion.

Kilkerran, *Res Judicata*, No. 2.

4. THOUGH ſome puniſhment have been decreed by an inferior Judge, upon complaint at inſtance of his fiſcal, ſtill the proceſs of the party injured is good, for recovery of his *damnum et intereſſe* in the competent judicature for ſuch a ſuit. Thus, in the trial of Douglas of Broughton (Jan. 11. and 18. 1725)

1725) at instance of Sir George Weir, with concourse of the Lord Advocate, for sundry acts of assault, the pannel pleaded *res judicata* as to one article of the charge, in respect of a fine which had been imposed on him for it, by the magistrates of Edinburgh, on the complaint of their fiscal: and this the Court found "relevant, *quoad vindictam publicam*, (for "this also was libelled), and not relevant as to the injury "done to the pursuer." Accordingly, Sir George Weir had a verdict in his favour, and recovered damages and expences. There is an older precedent to the same purpose. In July 1662, Alexander Gordon was called to answer at instance of the Lord Advocate, and a private complainer, for battery and deforcement. He pleaded on a decree of the Sheriff-court, for a fine of L. 50 to the fiscal, and a *solatium* of L. 20 to the individual, but this pronounced, as it appeared, in a prosecution at instance of the fiscal only. So far, therefore, as concerned the assythment to the private complainer, the process was sustained [1]; and sentence passed in the end for L. 100 of damages, including the L. 20 previously awarded by the inferior Judge.

Collusive trial in an inferior court is no *res judicata*.

5. NEITHER his Majesty's interest, nor that of the individual, can be affected by any previous conviction in an inferior court, unless it has been obtained in a serious and regular trial, truly calculated to satisfy the ends both of private and public justice. If the prosecution has been simulate and collusive, and a punishment has been applied, such as is plainly unsuitable to the transgression, this corrupt

[1] "The Justice-deputes, be their interloquitur, finds the dittay in sua far as "concernis the pursuer's assythment; and ordaines the samyn to pass to the "knowledge of an assyse."

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corrupt contrivance ſhall not ſerve its ſecret purpoſe, of protecting the offender from the due correction of his wrong. And to this purpoſe the Books of Adjournal ſupply us with many teſtimonies. For it ſeems formerly to have been a frequent device with us, in caſes of aſſault or deforcement, or the like, that, to avoid the conſequences of his fault, the offender got himſelf called ſtraightway at inſtance of the fiſcal, before the Sheriff or other Judge of the juriſdiction in which he dwelt; and there, on his own confeſſion, or ſuch other evidence as was found convenient, decree paſſed againſt him for a fine, or ſome other ſlight and unſuitable cenſure. Sometimes too, things having been ſecretly arranged with the party ſufferer, he alſo concurred in the fiſcal's proſecution. Now in every inſtance where, upon inquiry into the circumſtances of the trial, ſuch has appeared to be the falſe complexion of the proceedings, our practice has been, not even ſo far to conſider the colluſive ſentence, as to require a ſuſpenſion or advocation for taking it out of the way; but to proceed in the action of the proſecutor having intereſt, without paying any regard to ſuch ſentence at all.

Nov. 4. 14. and 20. 1723.

THUS, Alexander Innes of Dunkinty, having been guilty of aſſault and deforcement, had been complained of at inſtance of the fiſcal of the Sheriff-court of Murray; and, on a reference of the libel to his oath, having confeſſed the charge under certain qualifications, he had eſcaped with a fine of L. 100 Scots. He was afterwards called to anſwer in the Supreme Court, at inſtance of the Lord Advocate, and the party injured; and here, after mature conſideration of this pretended *res judicata*, he underwent a ſecond trial, and had ſentence to pay L. 40 Sterling of fine and damages, and find caution

caution in lawborrows to the complainer. Another caſe of the like character was decided in the ſame year; the caſe of John Higgins, who, in a proſecution before the Lords, at inſtance of the party injured, for an act of riot and aſſault, was fined in L. 200 Scots, and was ordered to find caution in lawborrows, and was baniſhed for life, from the pariſh of Airth; notwithſtanding the previous ſentence of a baron-bailie, impoſing a fine of L. 50 Scots, at the ſuit of the fiſcal of his county. The like point underwent ſome diſcuſſion in the trial of William Paterſon, in December 1751, at the inſtance of John Paterſon, for the murder of his wife, by beating her with a ſtaff. In the woman's lifetime, and while as yet it was not ſuppoſed that the injuries done her would prove mortal, a complaint had been offered to the baron-bailie of the bounds, in the name of the fiſcal, and the woman, and her huſband for his intereſt; and this had been followed with an award of L. 10 Scots of fine, and L. 20 Scots of damages and expences. But it appeared that the huſband alone had ſigned this complaint, and that it had truly been framed by the advice of the baron-bailie himſelf, who was in concert with the offender, to favour and protect him. For which reaſon, and on account of certain objections to the decree, as in ſome meaſure fabricated and made up *ex poſt facto*, the Court found that the pannel could have no advantage of it, towards hindering his trial [1].

July 1. 8. 11. 1723.

Dec. 6. and 9. 1751.

In holding ſuch proceedings, our Judges, of later times, have only followed the precedents which they found in the practice of

Colluſive ſentence is no *res judicata*.

[1] "They repelled the defence of *res judicata* pled for the pannel; and found "the libel, as reſtricted by the purſuer, relevant," &c.

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Jan. 8. and 9. 1677.

Feb. 7. 1676.

of their predeceſſors. For, in 1677, in the trial of George Hardie, for hameſucken, the anſwer of colluſion was ſuſtained to ſet aſide the plea of *res judicata*, which was propoſed on a decree of the bailies of Kirkwall, at inſtance of their fiſcal, for a fine. In the trial of John Rymer for the like offence, in 1676, *res judicata* was objected, on a decree of the Sheriff of Fife for fine and aſſythment; to which the proſecutor anſwered, that the trial had been colluſive, and that he had given no authority to inſiſt there for any ſuch amends. The Lords "having conſidered the indytment and wholl debate "together with the perſewer's own declaration, whereby he "declaires he inſiſts only *ad pœnam extraordinariam* for dam"nage and intereſt to the partie woundit, repell the defence "foundit upon the Sheriff's decreit as to the mutilation ly"belled, and the damnage and intereſt to the partie inferred "thereupon, and remits," &c. This man was convicted, and found liable in L. 1000 Scots to the party, and 100 merks to the clerk of Court for his Majeſty's uſe.

HAVING mentioned theſe particulars, concerning the form and effect of ſentence in general, I ſhall now cloſe this chapter with a brief notice of the different ſorts of puniſhment, of which I find any memorials at the different periods of our practice.

Puniſhment of death; how inflicted.

I. THE firſt and higheſt is the puniſhment of death. Which, in later times, has always been inflicted in one way, that of hanging by the neck on a gibbet, without any aggravation of bodily ſuffering; farther than that in caſes of cruel and atrocious murder, it has ſometimes been ordered to ſtrike off the right hand before ſuſpenſion[1]; and that in caſes of treaſon, a

[1] This was ordered to be done in the ſentence of Norman Roſs, a ſervant, for the murder of his miſtreſs; 22d November 1751.

a female offender periſhes by fire, and a man is executed with many additional circumſtances of indignity and horror, which, however, his Majeſty may and uſually does remit[1]. But formerly various ways of execution ſeem to have been uſed. For all high and atrocious crimes, and more eſpecially for murder, and in the caſe of habitual thieves and depredators, the ordinary courſe was by beheading; and in two inſtances of aggravated murder, that of John Dickſon of Belcheſter, who murdered his father, and that of Robert Weir, who murdered Kincaid of Warrieſton, at the inſtigation of his ſpouſe, we had adopted the French way of breaking alive on the wheel [2]. In caſes of hereſy and witchcraft, the inevitable doom was, to be burned quick; and ſometimes the like was ordered on conviction of beſtiality, or inceſt [3]; or at leaſt,

April 30. 1591.

June 26. 1604.

[1] In the caſe of Robert Watt, tried in Auguſt and September 1794, his Majeſty ordered all theſe circumſtances to be remitted; and directed, that in lieu of them, the head ſhould be ſevered from the body, when lifeleſs, and be held up in view of the people.

[2] The doom orders him to be broken alive upon a *row* or wheel, and to remain expoſed upon it for twenty-four hours, and the row, with the body, to be afterwards ſet up between Leith and Edinburgh, by the place where the murder was done. There is this entry reſpecting it in the Diary of Robert Birrell: "The "16th of Junii, Robert Weir broken on ane cart wheel, with ane coulter of ane "pleuche, in the hands of the hangman, for murdering of the guidman of War-"riſton, whilk he did, 2d Julii 160 ."

[3] James and Agnes Bonnar, (Feb. 2. 1570), were doomed to be burned for inceſt and adultery; Euphan Malcalzean, for a combination of ſorcery and treaſon, (June 9. 11. 12. 1591), "to be burned quick to the death;" Lady Glamis, to be burned quick for treaſon, (July 17. 1537); Michael Erſkine for ſodomy, (April 2. 1630); and Major Weir, for inceſt and beſtiality, (April 1670), to be worried at a ſtake, and the body burnt to aſhes; as was alſo ordered in theſe convictions of beſtiality, Andrew Love, April 17. 1662; Thomas Fotheringham, Nov. 12. 1702; and George Robertſon, Dec. 22. 1719.

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the abhorred offender was appointed to be *worried* at a ſtake, and the body to be burned to aſhes. There are a few inſtances alſo of execution by drowning; as in the caſe of Helen Faa, a gypſey, and ten females more of the ſame tribe; in the caſe too of George Sinclair, for inceſt committed with two ſiſters; and of James Mitchell, for beſtiality. At Edinburgh, this ſort of doom ſeems ordinarily to have been carried into effect, in the loch (as we call it) on the north of that city.

Jan. 29. 1624.
Aug. 2. 1628.
Mar. 1. 1675.

Diſpoſal of the dead body.

WITH reſpect to the diſpoſal of the dead body: This, in caſes of murder, is, by ſtatute, 25th Geo. II. c. 37., appointed to be, by delivery of the body to a ſurgeon for diſſection, unleſs the Court ſhall order it to be hung in chains. Of which way of expoſure I find an inſtance as long ago as 1630, when the body of George Tillery, convicted of murder, was ordered "to hang y^r^aftir in ane irone cheinze, quihile he rot away, to "the terrour and exampell of utheris." The like appointment was made as to John Dow Macgregor, a meſſenger, convicted of theft, robbery, and murder; and as to John Black, a murderer; as alſo in ſeveral later caſes of more than uſual wickedneſs, ſuch as that of Norman Roſs, a ſervant, who murdered his miſtreſs, and Andrew Wilſon, who poiſoned his wife.

July 30. 1630.
April 4. 1637.
Dec. 29. 1652.
Nov. 22. 1751.
Aug. 13. 1755.

Eſcheat of goods follows ſentence of death.

BY cuſtom time out of mind, every capital ſentence is attended with a farther conſequence, the confiſcation, or eſcheat as we call it, of all the convict's moveable goods and ſubſtance, to his Majeſty's uſe; to which effect the ſentence bears a general declaration, and an order and authority to the proper officers, to collect and bring in the effects. This had become the law of Rome under the Emperors; but it is the cuſtom alſo of ſeveral nations, who have not the ſame regard to the Roman law that we have, and has probably been derived to us from

from a leſs remote ſource. Except in caſes of treaſon, the forfeiture of property on capital conviction, has never, at any period of our practice, extended to the real or heritable eſtate; which in England, at this day, ſeems to fall as eſcheat to the Lord of the fee, in all caſes of petty treaſon or felony. In this reſpect alſo, our cuſtom is leſs rigorous than that of England, as we have never admitted that fictitious corruption of blood, conſequent with them on attainder of felony; whereby all deſcent of property to the felon's kindred is obſtructed, wherever they have to connect a title of inheritance through him to any of their predeceſſors. One queſtion may, however, deſerve to be conſidered, which yet I do not find ſtirred in any of our law-books: Whether, in caſe of a capital convict making his eſcape, and avoiding execution of his ſentence, his lands do not accrue for his lifetime, to the ſuperior of the fee. For they cannot be enjoyed by the convict himſelf, who is dead in law; and yet, ſince he is only civilly and not naturally dead, and may ſtill receive a pardon, his heir cannot make up a title to them, in connection with him as heir; and, on the other hand, there ſeems to be no inſtance of ſuch a temporary and defeaſible fee in the Crown, or its donatory: ſo that the juſt reſult ſeems to be, in the eſcheat of the lands to the ſuperior, as in other caſes where he is unprovided of a vaſſal. But this I only offer as a doubt of my own, not confirmed certainly with any judgment of court, nor even with the authority of any writer on our law.

But no forfeiture of heritage.

Blackſtone, b. 4. c. 29.

Nor corruption of blood.

Blackſtone, *ibid.*

II. The puniſhment next in degree to death, is that of tranſportation beyond ſeas; which, in the law of England, ſeems to be the creature of ſtatute only, but with us was gradually, and at an ancient period, incorporated into the common law;

Tranſportation beyond ſeas.

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law; though, at firſt, under authority only of warrants from the Privy Council, whoſe example came ſoon to be followed by the Juſticiar and his deputes. But on this head, I will not now enlarge, having formerly [1] had occaſion to trace the hiſtory of this ſort of exile, in treating of its application to the crime of leaſing-making. After the eſtabliſhment of the preſent Court of Juſticiary, ſentence of tranſportation came to be explicated in ſomewhat a different faſhion, from that which had formerly been practiſed; namely by conveyance of the criminal to ſome of the Britiſh colonies abroad, and particularly to Virginia or Barbadoes. Thus, on the 2d Auguſt 1675, George Alves has ſentence, upon his own petition, "to be "tranſported to Virginia or Barbadoes with the firſt occaſion, "he enacting himſelf never to returne under pain of death. "Conforme to which ordinance compeared perſonallie the "ſaid George Alves, and became judiciallie acted never to "return out of Virginia or Barbadoes, (to which he is con-"tent to be tranſported under the paine of death)." On the ſame day, in purſuance of the petition of John Millar and William Maclandrie, the Lords, "with their own conſent, "ordaine them to be tranſported to Virginia or Barbadoes, "they enacting themſelves never to returne, under paine of "death."

Mode of executing ſentence of tranſportation.

At a ſtill later period, when the ſituation of things had given occaſion to permanent contracts between his Majeſty's ſervants and individuals, for the tranſportation of convicts to the foreign plantations, it came to be a part of the ſentence, that the ſervices of the convict were adjudged to ſuch contractor for a term of years; he giving bond under a certain penalty,

[1] See Commentaries on the Deſcription of Crimes, vol. ii. p. 101. *et ſeq.*

penalty, to land the perſon in one of the American colonies, and to report within year and day a regular certificate to that effect. If there were no ſuch contract ſubſiſting at the time, ſpecial orders were then made for delivery of the ſeveral convicts under ſentence of tranſportation, to ſuch individuals as made application for them, and were willing to comply with the like condition; as for inſtance, in the caſe of Robert Shaw, for whom bond was given under the penalty of L. 100. Sept. 27. 1726.

Certification in caſe of return from tranſportation.

As appears from the entries above quoted, and many others which are engroſſed in a former chapter of this work [1], the certification of old, in caſe of the convict's return to Scotland before the expiration of his term, was invariably death. Afterwards, other penalties came to be occaſionally applied, and ſometimes that of perpetual impriſonment; as in the ſentence of Iſobel Nicolſon, Auguſt 6. 1711 [2], and of Campbell of Burnbank, March 31. 1721. It was not, however, till towards the middle of the preſent century [3], that the

[1] See Commentaries on the Deſcription, &c. of Crimes, vol. ii. p. 108. *et ſeq.*

[2] The words in Nicolſon's caſe, are: "She ſhall be condemned to *perpetual* "*impriſonment*, and to be ſcourged by the hand of the common hangman, the "firſt Wedneſday of July yearly, being a lawful day, and failzieing thereof the "firſt lawful day thereafter."

And theſe are the words in Campbell's caſe: "And from thence to be tranſ-"ported from Sheriff to Sheriff, till he be brought to Edinburgh, and there to be "committed priſoner within the tolbooth thereof, therein to remain during "life, whilk is pronounced for doom."

[3] I ſay, towards the middle of the preſent century; becauſe I find inſtances, though not ſo frequent, of enactment of tranſportation under pain of death, till about

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the capital certification came to be entirely laid aſide, for that of conveyance to the gaol from which the convict was carried abroad, ſcourging on the next market-day after commitment thereto, and on the firſt market-day of every ſucceeding month, until an opportunity ſhould offer of re-tranſporting. But now, in virtue of the ſtat. 25. Geo. III. c. 46., the certification is again made capital, and this not only as of old, in caſe of returning to Scotland after tranſportation, but more generally, "if the offender who ſhall be "ſo ordered by ſuch court as aforeſaid, to be tranſported be-"yond the ſeas, &c. &c. ſhall be afterwards at large, within "any part of the kingdom of Great Britain or Ireland, with-"out ſome lawful cauſe;" ſo that he is liable to ſuffer death if he even break gaol after his ſentence, to avoid tranſportation, and be found at large within theſe realms, or any of them. It ſeems, however, to be doubtful, by the words of the act, whether this high denunciation does not apply to thoſe offenders only, who have had judgment of tranſportation in purſuance of trial and conviction of a crime, or who have entered into a contract to tranſport themſelves, and not to ſuch who are ordered to be tranſported on their own petition, without trial. The ſame ſtatute, in effect empowers the Lords of Juſticiary to decern for tranſportation generally, to ſuch place as his Majeſty, with advice of his Privy Council, ſhall think fit; as alſo to adjudge the ſervices of the convict, to ſuch perſon as ſhall contract for the due performance of ſuch tranſportation; and, laſt of all, it equitably orders, that the time of the convict's confinement in gaol, under ſuch ſentence, ſhall be reckoned in diſcharge of his term of exile.

III. To

about that time. See the enactment of Duncan Cameron, Sept. 27. 29. 1726; and of Alexander Macpherſon, Oct. 28. 1726.

Baniſhment from Scotland.

III. To this of tranſportation to parts abroad, I naturally ſubjoin the puniſhment, though certainly far from being next in degree, of ſimple baniſhment forth of Scotland: A ſort of ſentence of ſtill greater antiquity in our practice than the other, and which naturally took its riſe in our ſtate of hoſtility to England; and has been ſince continued, to ſay the truth in no very friendly or neighbourly way, after the Union of the two Crowns, and even that of the two kingdoms into one realm. Happily they have not yet thought in England, of taking that ample and ſevere revenge on us, which they have in their power, if they were diſpoſed to retaliation.

Certification in caſe of return to Scotland.

It has been the ordinary courſe for the execution of this ſentence, that the convict is charged with the care of it himſelf; being releaſed from priſon, and allowed a reaſonable ſpace of time to ſettle his affairs and depart; after which, if he be again found here, he ſhall ſuffer the certification of the ſentence. This has been different at different times. From the beginning till the middle of laſt century, and even later, the ordinary ſtyle of the priſoner's enactment was "under the paine of deathe;" and very often, the ſentence was for his departure out of England as well as Scotland, "or to "be banniſt his Majeſty's hail dominions:" As in theſe inſtances; Alexander Thomſon, 14th March 1617; James Middleton, November 18. 1618[1]; Henry Kinloch, September 20. 1622;

[1] In the caſe of Middleton, theſe are the words of a warrant of Council: "The "Lords ordainis the Juſtice, Juſt. Clerk, and his deputes, to appoint and ſett a "Juſtice-court, and to tak yis ſupplicant actit in the Books of Adjournalle, "that he ſhall depairt furth of the *realmes of Scotland and England*, within the "ſpaice of ane month after the daite heireof, and returne again within yis realme, "under

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1622; James Crawford, December 4. 1629; John Johnſton and others, April 20. 21. 1630; Alaſter Macinnes, April 2. 1631. Afterwards, this ſeverity was relaxed, but only to the effect of ſubſtituting the penalty of tranſportation, or ſome grievous bodily correction. Tranſportation was the penalty in the ſentence of Helen Wilſon, Auguſt 6. 1722; of Alexander Stevenſon, Auguſt 26. 1726; of Janet Smith, December 24. 1726; of John and Elizabeth Bell, June 18. 1736: and to this, in the caſe of Richard Tarleton, April 18. 1726, was added impriſonment for a year, and whipping on the firſt Wedneſday of every quarter. More grievous ſtill; on the 1ſt March 1727, Iſaac Dalrington and four perſons more, were baniſhed Scotland on their own petition, under pain of impriſonment for life in caſe of return: as was John Tenant, on the 11th of Auguſt 1714, under pain of impriſonment for two years, and whipping once a-month; and James Inglis (14th November 1720) under pain of impriſonment for ſeven years, and ſcourging once a-quarter; and John Scott (Mar. 5. 1734) under pain of whipping once a-quarter, and impriſonment indefinitely, "until the Lords gave further directions "how they would diſpoſe of him." But for a good many years paſt, this variety and uncertainty, have been properly exchanged for the uniform penalty of impriſonment, and whipping on the firſt market-day after conveyance to the gaol where the perſon has been at the date of his ſentence.

BESIDE

"under the paine of deid; and he haifing actit himſelff as ſaid, ordainis the ſaid "Juſtice to caus put him to libertie."

In Alexander Thomſon's caſe, the Court decern him "to be banniſhed his "Majeſty's haill dominions, and not to return again within the famin at nae time "hereafter, without his Majeſty's licenſe, under the paine of dead." The others are of the like ſubſtance, and nearly in the ſame form of words.

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Baniſhment from a diſtrict of Scotland.

BESIDE this of baniſhment from the realm of Scotland, the Court of Juſticiary have occaſionally paſſed ſentence of a more limited ſort of baniſhment, from certain counties only, or a certain diſtrict of country; and this alſo under penalties of very different degrees. On the 24th January 1662, John Rae was baniſhed from the three Lothians, under pain of death. As was Marion Lawſon, on the 20th Auguſt 1662, from the ſheriffdoms of Lanark and Mid-Lothian, under the like certification. On the 3d July 1711, the Lords baniſhed Euphan Clerk from the ſhires of Forfar and Perth, for ten years, under pain of tranſportation in caſe of return. Thomas Pyrie again, they baniſhed from the country north of the Tay, under pain of ſeven years' tranſportation to the plantations, and in caſe of return from thence, under pain of impriſonment for life. What is more limited than any of theſe; in a caſe of aſſault and battery, John Higgins was baniſhed, under the pain of 500 merks, from the pariſh of Airth, where both he and the proſecutor dwelled.

Mar. 16. 1726.

July 11. 1723.

What if the exile be arreſted in gaol for debt.

BEFORE quitting this article of our ſubject, it will be proper to obſerve, that ſentence of baniſhment or tranſportation may ſometimes interfere with the civil intereſt of the convict's creditors, who have uſed the diligence of the law againſt his perſon in gaol, and deſire to detain him there, towards the payment of their debts. But, it will hardly bear a doubt, that the public intereſt in the execution of the ſentence will here prevail over the private loſs; which the individual muſt ſubmit to, for the general good. And ſo it was determined in the caſe of William Douglas, in November 1752. This man being in the gaol of Stirling, under ſentence of impriſonment till a certain day, and of baniſhment for the ſpace of three years from that day; his creditors had

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there arreſted him, on captions for payment of their debts. In conſequence, the magiſtrates of that burgh applied by petition to the Court of Juſticiary, for inſtructions how to proceed. The Court found "that the criminal ſen-
"tence of baniſhment againſt the ſaid William Douglas
"paſt laſt Circuit at Stirling, muſt notwithſtanding of the
"arreſtment uſed upon the caption as above mentioned go
"to execution." Much in the ſame ſtrain, a judgment is reported by Lord Kilkerran, repelling the pretenſions of a gaoler to detain a convict from tranſportation, till payment of his fees [1]. Nor is the authority of theſe deciſions at all ſhaken

Nov. 16. 1752.

July 14. 1752. David Din, petitioner, *v.* Priſoner, No. 4.

[1] On the 18th November 1734, John Chriſtie, priſoner under ſentence of tranſportation, complains by petition, that Mr Clelland, gaoler, refuſes to deliver him to the perſon who has the order of Court for his tranſportation, till payment of five guineas of gaol-fees. After hearing the gaoler, the Court ordained him to deliver over the priſoner, "and that without payment of any priſon fees;" 25th November 1734.

Formerly, the Court, in ſome inſtances, went the length of protecting a priſoner from all arreſtment for civil debts, during the currency even of his ſentence of impriſonment. On the 15th January 1677, George Hardie, a perſon from Orkney, and priſoner upon ſentence for an aſſault, ſets forth in a petition, that he is under hazard of captions and acts of warding, and therefore prays relief. "The
"Lords, &c. diſchairge all meſſengers at armes, and other officers whatſomever,
"from uſing or putting any acts of warding, captions, or arreſtments for civil debts,
"to execution againſt the perſon of the ſaid George Hardie, ſua long as he re-
"maines priſoner in the tobuith of Edinburgh, by virtue of their ſentence, and
"for twentie days thereafter, that he may return ſaif to his own country." The abuſe of theſe and other the like protections being complained of, it was corrected by the ſtat. 1681, c. 9. which allows the Lords of Juſticiary to give protections to ſuch as are charged to compear before them, for the neceſſary ſpace of time only, not exceeding one month. On the 27th February 1783, Ranald and John Macdonald, preſent a petition to the Lords of Juſticiary, ſtating, that they are called by a criminal libel, raiſed againſt them for battery *in the Sheriff-court* of Inverneſsſhire, and praying for a protection for three weeks againſt the diligence

Mar. 3. 1790.

ſhaken by what was found more lately, in the Court of Seſſion, in the caſe of Thomas Hall. This man had been under ſentence of tranſportation, but had afterwards received a pardon from his Majeſty, on condition of enacting himſelf in baniſhment from Britain, for the ſpace of ſeven years after the time of his enlargement from gaol. And it was this circumſtance, of the event from which his ſeven years' exile were to be computed, that here carried the deciſion in favour of his creditors, uſing the diligence of the law againſt his perſon. For the Lords very juſtly thought, that, in this ſituation, the civil proceſs and the condition of the pardon might both have their full effect; the one operating to detain the man in the mean time, and the other attaching to him at the day only of his releaſe; ſo that how long ſoever he were kept in gaol by the civil diligence of the law, ſtill he would ſuffer baniſhment for the entire term of ſeven years from that day, as articled in his pardon. More lately ſtill, John Rutherford applied by petition, ſtating that he was under ſentence of baniſhment from Scotland for his lifetime, with allowance of a month to prepare for his departure; but that before leaving the Court-room, he had been arreſted as one *in meditatione fugæ:* Wherefore he prayed to be ſet at liberty, and to be allowed a month from the time of his liberation, to ſettle his affairs. The Lords ſtraightway refuſed this petition. It was clear, that, for the period of a month from the time of his ſentence, the diligence of his creditors was good; and it was ſoon enough for the Court to interfere, when

Dec. 24. 1790. Record of Juſticiary.

gence of their creditors, whereby they may be enabled to appear. "The Lords, "&c. having conſidered the foregoing petition, *with the act of Parliament there-* "*in referred to*, they refuſe the deſire of the petition." The act 1681, empowers the Lords to protect thoſe only who are charged to appear before themſelves.

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when it ſhould be found that ſuch diligence was truly, and not colluſively, employed to detain him beyond that term.

Puniſhment of ſcourging.

IV. I SHALL now deſcend to the inferior corporal puniſhments. Whereof the moſt ordinary is that of whipping or ſcourging; which may be ordered to be repeatedly inflicted at intervals, or in different parts of the kingdom; and has often been adjoined to that of impriſonment, or pillory, baniſhment, or tranſportation, or even, according to the magnitude of the offence, to more than one of theſe corrections.

Boring the tongue, nailing the ear, pinching the noſe, &c.

BESIDE ſcourging, mention is made in ſeveral of our ſtatutes, which have been noted in their proper places [1], of other corporal pains, ſuch as diſmembering the hand, cutting out or boring the tongue, or the ears, and a few others of the like ſtamp; all of which ſeem to have been occaſionally inflicted of old, but have now for ſome time been little uſed. There are ſome inſtances too, of nailing the ear to the gallows, or to the trone or pillory; as in the caſe of Duff and Millar, in March 1701, and of Andrew Drummond, 29th November 1703: And again, it has ſometimes been thought proper, to brand a notorious offender upon the cheek, or the forehead, as in the caſe of Janet Davidſon, 4th April 1637. I learn alſo, from certain articles in a liſt of ſentences, which is ſubjoined to the papers in the ſuſpenſion at inſtance
Jan. 1730. of Ludovick Campbell, that another ſort of perſonal ſuffering had ſometimes been inflicted in the inferior courts, whereof the preciſe nature and faſhion is not ſo well known.

The

[1] See inſtances of this in caſes of Falſehood, Commentaries, Part 1. vol. i. p. 197. Note; and in caſes of Perjury, vol. ii. p. 151. Notes; vol. ii. p. 45.; vol. ii. p. 208.

The liſt contains the following entries: " 28th Dec. 1726, " the trial *ditto* againſt George Melvil, notour thief; ſet on " the trone, *and his noſe pinched.* 17th Oct. 1727, the trial " ditto againſt David Aliſon, &c. for theft, pillored, *pinched* " *in the noſe*, and ſent to the correction-houſe. 29th March " 1728, the trial ditto againſt Jean Spence, a notour thief, " pillored, her lug nailed, and *her noſe pinched.*"

Another claſs of puniſhments, conſiſt chiefly in their ignominy, or the open expoſure of the culprit to contempt and deriſion, and to the public knowledge as a baſe and infamous perſon; though in moſt of them, he ſuffers alſo ſome degree of bodily diſtreſs. Such is the puniſhment of ſtanding in the pillory; of which inſtrument, we have this account in Spelman [1]: " *Eſt ſupplicii machina, ad ludibrium magis quam pœnam,* " *quo quis ſuper pegmate conſtitutus, comprehenſoque inter fauces* " *duarum tabularum, ideo cavatarum, collo, ſpectaculum populo* " *præbetur deridendum.*" It appears, however, from the barbarous Latin name of *colliſtrigium*, or *ſtretchneck*, which the Engliſh ſtatutes apply to this machine, that it was conſtructed formerly, in ſome meaſure, for the bodily uneaſineſs, as well as the ſhame and contempt of the ſufferer. From the directions too, which are given in one of thoſe laws, for making the *colliſtrigium*, Mr Barrington [2] has inferred, that by means of this inſtrument, as contrived of old, the patient was in a manner ſuſpended in the air, but in ſuch a way as not to be in danger of ſtrangling. We learn likewiſe from Spelman, that the term of *pillory* has improperly been

Puniſhment of the pillory.

[1] Gloſſary, *v. Pilloria.*

[2] See Barrrington on the Statutes, p. 40. 41. 170.

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been transferred to the inſtrument of caſtigation, from the offence itſelf to which this ſort of reproof was firſt applied, namely that of *pilleurie*[1], as it was called in old French, or the offence of a baker who cheated and *pillaged* the public, by the uſe of ſhort or falſe weights in his trade.

Puniſhment of the ſtocks, juggs, and cuck-ſtool.

To the ſame claſs belong the puniſhments, which are mentioned in ſeveral of our ſtatutes, eſpecially thoſe concerning drunkenneſs and profanity, of ſtanding in the juggs, and being ſet in the ſtocks, or on the cuck-ſtool. The laſt of theſe, which, in its original, is ſaid to have been a *ducking-ſtool (trebuchetum)*, and to have been chiefly uſed for the reformation of female offenders, ſeems to have been altered with us into a ſort of pillory, or mode of expoſure only to pu-

Feb. 24. 1673. blic humiliation and reproach. Donald Campbell for reflections injurious to the Earl of Athole, Juſtice-General, had ſentence to ſtand two hours on the *cuck-ſtool*, and to crave par-

Nov. 29. 1703. don, and have his tongue bored. Andrew Drummond, for an aſſault, had ſentence to be ſet on the cuck-ſtool, and "there to have his neck and hands put in the ſame, and his "lug nailed thereto for the ſpace of an hour."

Puniſhment of infamy.

Most of the puniſhments which have now been enumerated, are of that claſs which affix the ſtain of infamy to the ſufferer,

[1] "*Et fortè a notiori fonte deducunt; utpote è vernaculo ſuo* PILLEUR, *quod "depeculatorem ſignificat; cujuſmodi eſſe noſcuntur ipſi quibus hoc ſupplicii pri-"mò inſtitutum fuit, ſcilicet piſtores, qui ſuis in pane fallaciis rempub. depeculan-"tur; a quo, et ipſa ſua nequitia* PILLEURIE *dicta fuit, quaſi depeculatio; et ſic "vox propriè ad delicti naturam ſpectat, non ad ſupplicii inſtrumentum, quod ſuo "vocabulo* COLLISTRIGIUM *nuncupant, licèt ad hoc etiam poſteà deferatur. Sua-"dere id mibi quidem videntur ipſa verba ſtatuti de piſtoribus, ubi dicitur,* SUBEAT "JUDICIUM PILLORIÆ, *ac ſi legeretur,* SUBEAT JUDICIUM DEPECULATIONIS." SPELMAN, *v. Pilloria.*

ſufferer, at leaſt when they are inflicted in purſuance of conviction by the verdict of a jury; and thus diſable him to enjoy honour or place of truſt, or to be received as a witneſs on his oath. By ſpecial ſtatutes alſo, infamy is the appointed puniſhment of certain offences; ſuch as bigamy, perjury, ſubornation, wilful error on aſſize, bribery in a judge, and ſome others. Likewiſe, in ſeveral inſtances, without the poſitive direction of ſtatute, the Supreme Courts of Juſticiary and Seſſion have juſtly applied this *ſtigma*, by ſpecial declaration of their ſentence [1], in the caſe of thoſe offences to which it ſeems a ſuitable reproof, ſuch as the falſehood or groſs malverſation of perſons in ſituations of public truſt.

1551, c. 19.
1555, c. 47.
1475, c. 63.
1579, c. 93.

Another of our ordinary puniſhments, is that of impriſonment or loſs of liberty; which is not properly a puniſhment in the perſon. It is applied chiefly to the inferior offences; yet, when protracted to a long period of time, it cannot juſtly be accounted a ſlight reproof, as well on account of the depreſſion of ſpirits and loſs of comfort which attend a tedious confinement, as on account of the probable injury in point of health, and the loſs to the indigent offender, of the means of ſubſiſtence to his family, not to mention the prejudice to his fame, not ſoon to be recovered. Accordingly, if I miſtake not, our Legiſlature have not in any inſtance thought it fit to prolong this ſtate of durance beyond the ſpace of one year. Neither can I find, that our Judges have ever been in the uſe of dooming to impriſonment for thoſe long terms, of four and five years, of which

Puniſhment of impriſonment.

[1] See Commentaries on the Deſcription of Crimes, vol. i. p. 227. 228.; and Acts of Sederunt.

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which inſtances [1] have ſometimes happened in the practice of our neighbouring kingdom; but in any caſe where there was need of ſeverity, have rather thought it better to eke out the ſentence with the addition of ſome corporal chaſtiſement, or other penalty ſuitable to the offence. Indeed, the examples have not been many, of ſentence of impriſonment for more than twelve months; and, as far as I have obſerved, except in the ſingle caſe of Mary Nicol, (Feb. 19. 1705), who had been convicted of ſomething not very remote from child-murder, and was ordered to be ſcourged, and confined for three years in the houſe of correction, there is no record of the time of durance being extended to more than two. It is true, that as a certification in caſe of return from baniſhment or tranſportation, mention is made of impriſonment for a longer time, nay for all the days even of the priſoner's life [2]. But theſe exceſſive, and I think exceptionable denunciations, ſeem to have been iſſued *in terrorem*, rather than with any ſerious purpoſe of carrying them into effect; not to mention, that this ſort of proviſional order is very different from an abſolute and irrevocable ſentence. It

[1] Lord George Gordon, for a libel, was ſentenced by the Court of King's Bench, to five years' impriſonment, and to find caution for his good behaviour, under a high penalty.

[2] I have ſeen an extract of a ſentence, dated in December 1701, of the Commiſſioners of Juſticiary of the north diſtrict, for ſecuring the peace of the Highlands, wherein, by way of commutation for death, Donald Macdonald is adjudged as a *perpetual ſervant* to the Earl of Tullibardine, and is ordained to wear a braſs collar on his neck, bearing an account of him and his ſentence.

Alſo, in the liſt above mentioned, of ſentences pronounced by the magiſtrates of Edinburgh, as Sheriffs, I find this entry, "James Stewart *alias* Macpherſon, a "vagrant thief, whipped, and ſent to the correction-houſe *for life*." But neither of theſe ſentences can be conſidered as making a precedent in law.

Blackſtone, book iv. c. 9.

It is alſo true, that in one inſtance, impriſonment for life is a lawful ſentence, namely for miſpriſion of treaſon; but this we have only received as an article of the Engliſh ſyſtem of treaſon-law, now made ours by ſtatute. In the practice of that country, perpetual impriſonment is the conſequence alſo of ſtriking in the King's ſuperior Courts of Juſtice, ſitting in Weſtminſter Hall, or at the aſſizes.

Puniſhment of impriſonment.

It does however appear, that a thing was formerly practiſed with us, in itſelf certainly improper, and of which I ſee no inſtance in more improved times; that of ſentence to impriſon indefinitely, or during the pleaſure of the Court. To mention but two caſes out of many. On the 28th June 1666, verdict having been found againſt Robert Forbes, for blooding and wounding, "the Juſtice-depute ordeinit the ſaid "Robert Forbes to be put in priſonne within the tolbuith of "Edinburgh, therein to remaine while he be put to libertie "by ordour of law and juſtice." In like manner, on conſidering the verdict againſt Sir John Carnegie of Pittarrow and John Arbuthnot of Fordoun, "The Lords ordain the ſaid "Sir John, &c. inſtantly to be carried to priſon, and there to "remain during their Lordſhips' pleaſure, which is pronoun-"ced for doom." But the truth is, that, far from being intended to wrong the convict, this indefinite ſort of order ſeems to have been uſed in thoſe times, as a means of ſhowing him favour and indulgence: for I obſerve, that almoſt uniformly in ſuch caſes, the priſoner, after being detained for a few days, was diſmiſſed on his own petition, bearing profeſſion of penitence, and a promiſe of amendment for the future. In each of the two caſes above mentioned, the order for liberation appears in the record, on the very next day after the ſentence.

Jan. 31. 1709.

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Puniſhment of hard labour.

ALONG with impriſonment, it may often be a ſuitable thing, that the ſentence ordain the priſoner to be employed in ſome ſort of labour; whereby, not only is the *ſqualor carceris* rendered leſs hurtful to his health, but the public are in part relieved of the charge of keeping him, and the perſon has the chance at leaſt of gaining more induſtrious habits. And I think it is not to be doubted, that independently of our ſtatutes, many of which appoint this courſe of diſcipline for offenders of certain kinds, eſpecially beggars and vagabonds, and the harbourers of ſuch, there is ſufficient authority in law for qualifying a ſentence of impriſonment with ſo reaſonable and wholeſome a proviſion. Accordingly, in the burgh court of Edinburgh (as I learn from a liſt of ſentences ſubjoined to the papers in the ſuſpenſion for Ludovick Campbell) it has long been an ordinary thing, in the caſe of petty thieves or incorrigible vagrants, to give ſentence for their employment at labour in the houſe of correction. But, in the Supreme Court, owing perhaps to the want of any commodious, or extenſive eſtabliſhment of this ſort, the like expedient ſeems but ſeldom to have been reſorted to. It has, however, been mentioned, that Mary Nicol, for concealing her pregnancy, and failing to call for help to the birth of her child, &c. was ſent to the houſe of correction for three years; as was Iſobel Stirling, in the like caſe, for the ſpace of ſix months.

Jan. 1730.

Feb. 19. 1705.

Nov. 21. 1726.

Eſcheat of moveables; loſs of office.

THE loweſt order of puniſhments, conſiſt of thoſe which affect the offender in his property only, or patrimonial concerns. Such is eſcheat of moveables; which is one article of the ſtatutory pains of deforcement, bigamy, perjury, and ſome other offences; but which, taken as the ſingle puniſhment

ment of any crime, is liable to the objection of applying very unequally to offenders in different ſituations of life. Such alſo is the puniſhment, which has been uſed in ſome inſtances, of depriving the culprit of ſome right, privilege, or franchiſe, of which by his offence he has made himſelf unworthy. Thus a Judge or clerk of Court, may properly be deprived of his office, for falſehood or corruption in that capacity; and the magiſtrate of a burgh, for failure to do his duty in quelling tumults there, or any burgeſs or freeman of the burgh, for joining in ſuch tumults, might juſtly be puniſhed with forfeiture of ſuch his franchiſe in the burgh. Accordingly, this was one article of the ſentence in the trials of David Barry, James Duncan, and Thomas Gilkie, for their acceſſion to the meal-mobs in 1720, in the burghs of Anſtruther, Montroſe, and Dundee.

May 30. Aug. 9. 1720.

Fine and damages.

AGAIN, for aſſaults not of an atrocious kind, and for petty riots and breaches of the peace, and ſuch like tranſgreſſions which do not carry aſſurance of a depraved diſpoſition, but may have been owing to indiſcretion, or ſome untoward concurrence of circumſtances, the ordinary courſe has been to puniſh the delinquent with a fine, payable to his Majeſty's uſe, and with an award of damages, *ſolatium* and expences to the party injured, where he has joined in the proſecution. In either caſe, to recover the ſum decreed, the complainer is not under the neceſſity of reſorting to the ordinary and tedious diligence of the law; but has inſtant ſecurity for it in the terms of the ſentence itſelf, which ordains the offender to be impriſoned till payment of the ſeveral ſums of fine [1], *ſolatium*, and

[1] It is almoſt needleſs to cite proofs of this poſition. However, the reader may look at the ſentence in the caſe of James Juſtice, Auguſt 4. 1744.

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and expences. In the caſe, however, of a mean and indigent perſon, to follow this courſe of diſcipline, would be much the ſame as to impriſon him for years, or perhaps for life. Againſt ſuch a one, therefore, the Judge, taking example from the tenor of our ſtatutes as to thoſe lower offences, rather proceeds by ſending him to priſon abſolutely for a certain term; or elſe by inſerting ſuch term of impriſonment as an alternative, by which he may redeem himſelf from payment of the fine. It is to be noted, that "the impoſing of exorbitant "fines," or ſuch as the offender either cannot at all pay, or not without his ruin, is one of the grievances which were ſet forth in the Claim of Right, at the Revolution. By another article of that valuable charter, the diſpoſing of fines and forfeitures before ſentence, is declared to be contrary to law; for in this way, the King's donator gained a title to proſecute for ſuch offences as were puniſhable in that ſort, and thus, occaſion was given to many frivolous and vexatious accuſations. And that this was not an imaginary grievance, appears, among other proofs, from the many libels which were raiſed for uſury, (and were privately compounded as appears from the frequent deſertions of the diet), between 1663 and 1670, at inſtance of the Earl of Glencairn, who had obtained a gift of all penalties and forfeitures, accruing from the infringement of the laws in that behalf.

Act 1689, c. 13.

I HAVE ſaid, that fines have commonly been exacted on account of ſuch treſpaſſes, as are not neceſſarily of a baſe or infamous nature. It is true, I have found in the Books of Adjournal, two inſtances of the levying of a fine from a thief: But theſe were the ſentences of inferior courts, which were brought

William Fairbairn, July 26. 1787.
Feb. 21. 1788.

George Miller, Nov. 27. 1755.

brought under review for other reaſons; and I have not obſerved, that on any occaſion, the Supreme Court have thought it ſuitable to apply ſo lenient a corrective to tranſgreſſions of that ſort.

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CHAPTER XVIII.

OF PARDON, AND OF PROCESS OF REVIEW.

CHAP. XVIII. TO complete our view of the law of Scotland reſpecting crimes, it now only remains to take notice of the ſeveral ways wherein the execution of ſentence may lawfully be prevented. Theſe ſeem to be principally two; by pardon, and by reverſal of the judgment on review.

Power of remiſſion is peculiar to the King.

I. WE have already ſeen, that, for reaſons of indiſpenſable neceſſity, there is lodged with the Lords of Juſticiary, a power of delaying the execution of ſentence, in extraordinary caſes. But as to the power of pardoning any convict, or finally releaſing him from his appointed doom, or any part of it, this, in no caſe even of the moſt evident juſtice, can in anywiſe be claimed by any of our Courts, but is reſerved as the benign and peculiar attribute of the Sovereign alone; who, as he is the fountain of juſtice, ſo is he the fountain alſo of grace and mercy; and will not fail to attend to the recommendation

recommendation of either the Court or the jury, in every inſtance where it is grounded in ſufficient reaſons. And, that our conſtitution has provided this excellent and lawful reſource, for redreſſing thoſe hardſhips in particular caſes, which may ſometimes ariſe out of the equal and inflexible, but wholeſome ſeverity of our penal laws and cuſtoms; this is a conſideration which ought never to be forgotten on ſuch occaſions, either on the Bench or with the aſſize. So that for no reaſon of favour, or compaſſion, or regard of popular opinion, may they be tempted to ſwerve from their oath, or that obedience which they owe to the laws of the land; whoſe wiſdom they are not to challenge, and whoſe authority they are not to diſown. And indeed, if we ever allow any ſuch deviation from the plain line of duty, and poſitive injunction of the law, how ſhall any bounds be ſet to this licence, or how ſhall we obviate the hurtful influence and evil conſtruction of this ſort of example with the public? But not to inſiſt too far on ſuch topics. If the Judge has no power to grant a remiſſion of his ſentence, ſtill leſs does any ſuch privilege belong to the proſecutor, public or private, at whoſe inſtance the judgment has been obtained. Thus far the law countenances his lenity, or his fickleneſs, that it will not conſtrain him to perſiſt in his proceſs becauſe he has brought it, but will allow him to deſert the inſtance at any period of the proceedings, not excepting even the lateſt, after verdict of guilty has been returned. But if judgment has once paſſed on the verdict, both action and proſecutor are then out of Court; and he is thenceforth but as one of the people, all of whom have now an intereſt in the execution of juſtice on a perſon, whoſe guilt and its conſequences have been openly declared in due courſe of law.

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King may pardon in all caſes.

In the Sovereign again, this the moſt enviable article of his prerogative, is, by our cuſtom, of univerſal application; to all crimes of every ſort or degree, and in what form ſoever the conviction have been obtained; whether at inſtance of the Lord Advocate, or the party injured, or both. It is true, that in the troubleſome and unruly times, of which under our native Princes this country had ſo much experience, the frequency of outrageous crimes, and knowledge of the many abuſes that aroſe from the granting of haſty pardons, "or upon inopportune ſuits made to his Majeſty therefor," had induced the King himſelf, on more than one occaſion, to move his Parliament for a ſtatutory reſtriction of this attribute of his royalty; and to pledge his word to them, "to "cloſe his hands" in this reſpect, and ceaſe from granting any remiſſion for ſlaughter, rape, fire-raiſing, and ſome others of the more violent and odious offences. At the ſuggeſtion of the Prince, ſeveral ſtatutes were accordingly paſſed, in ratification of this intereſting compact, and as a defence to his Majeſty againſt ſuch crafty or importunate ſuitors; ſome of thoſe ſtatutes for a certain term of years only, and others which ſeem to be intended for the lifetime at leaſt of the King at the time upon the throne, if not to be perpetual laws. But which of theſe is the better conſtruction of thoſe ordinances, is truly of little moment to be ſettled; becauſe none of them ſeems ever to have grown into good obſervance, with either the Sovereign or the judicatures of the land. It is true, ſuch a plea was occaſionally uſed at the Bar, as by Sir John Niſbet in the caſe of Bell of Blackethouſe, and that of Strachan of Glenkindy; but in neither of theſe inſtances was judgment [1] given on that ground: And indeed in

1503, c. 63.
1540, c. 118.
1584, c. 136.
1592, c. 157.

June 7. and 8. 1644.
Nov. 27. 1676.

[1] In the caſe of *Bell* the diet was deſerted, becauſe the private party did not appear to inſiſt in the proceſs. In that of *Strachan*, the remiſſion was rejected, becauſe it had not paſſed the Seals.

in his obſervations on thoſe ſtatutes, Mackenzie has expreſsly ſaid, that in his time remiſſions paſſed and were allowed without regard to them. Such too was the judgment of Court at a later period, when the queſtion came to be deliberately tried. This was in the caſe of Hugh Macneil, who being indicted for murder, at inſtance of the father of the deceaſed, with concourſe of the Lord Advocate, produced his Majeſty's remiſſion, and pleaded it in bar of trial. Whereupon the Lord Advocate withdrew his concourſe; but the private party ſtill inſiſting, and a debate having taken place on the ſtatutes and the terms of the remiſſion, the reſult was, that the Court "ordain the ſaid Hugh Macneil, pannel, to be ſett "at liberty upon his finding ſufficient caution to pay the pur- "ſuer the aſſythement, to be modified by his Majeſty's Ba- "rons of Exchequer."

P. 111. 211.

Feb. 25. and Mar. 4. 1717.

Pardon does not touch claim of aſſythment.

It appears from the laſt words of this judgment, that there is however a limitation of the Sovereign's power of remiſſion, with reſpect to the intereſt of the party aggrieved. It is true, the royal pardon prevails even over his intereſt, as far as this is grounded in reſentment only, and coincides with that of the public, in ſubjecting the offender to any cenſure or chaſtiſement for the ſake of example: but as to the peculiar and patrimonial intereſt of the ſufferer, in the recovery of damages, *ſolatium*, or aſſythment, on account of the injury he has ſuſtained, this is in nowiſe at his Majeſty's diſpoſal, but remains entire, notwithſtanding the pardon, how ample ſoever the terms in which it is given. And in this particular, our Legiſlature have been careful to guard the intereſt of individuals, with anxious and repeated proviſions of different kinds; ſome of them annulling a pardon in any caſe of homicide, unleſs it proceed on *letters of ſlaines*, and bear

Stat. David II. c. 44.
1457, c. 74.
1584, c. 136.
1592, c. 157.
1593, c. 173.
178.

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bear *in gremio* that the party has been aſſythed; and others, allowing the offender a ſpace of forty days to find ſurety for the aſſythment, wherein if he fail (he remaining all the while in gaol) then the remiſſion to expire, and the law to have its courſe. Nor were theſe proviſions a dead letter only, like thoſe formerly mentioned, or a threatening of ſeverity which was never intended to be carried into effect. For I find that in the caſe of Peter Dunne[1], a perſon convicted of murder, and pardoned, the Juſtice gives warrant to commit him to ward for the ſpace of forty days, within which time if he fail to find caution for aſſythment of the parties, then "to be "juſtifyit, and execute to the deid for the ſaids crimes, not-"withſtanding his remiſſione, conform to the law."

Apr. 19. 1554.

Pardon muſt be ſpecial as to the crime.

To have full effect, a pardon ought to make ſpecial mention of the offences wbich are meant to be remitted. In this reſpect an abuſe had formerly been complained of; that of obtaining a pardon on the narrative of ſome petty offence, *or licht cauſe* as the ſtatute calls it, and with a general clauſe ſubjoined in the cloſe of the writing, under which the culprit had his indemnity of all his tranſgreſſions preceding the date of ſuch pardon, how high ſoever their degree. By the ſtatute 1503, c. 62., this iniquity was ſo far guarded againſt, as for the future the benefit of the general clauſe in a pardon, was to reach to offences only of a lower degree than that which was

1 "And becauſe the ſaid Peter Dunne could get nae ſufficient ſoverties, to "find for him for aſſythement of parties, of the gudes and ſkaiths above ſpeci-"fied, the Juſtices therefore decernit him to be keepit in ſure ward, within the "ſaid tolbooth of Edinburgh, while the ſaid ſovertie were fundin by him, ſwa "that he find the ſamen with forty days next hereafter; and failing of finding "thereof, the ſaids fortie days being bypaſt, doome was given upon him to be "juſtifyit, and execute to the deid for the ſaids crimes, notwithſtanding his re-"miſſione, conform to the law."

was particularly related and forgiven. But notwithſtanding this enactment, which countenances in ſome meaſure thoſe general charters of remiſſion, it ſeems ſtill to be doubtful, and this for plain reaſons in the nature of the thing itſelf, whether a pardon can at all be effectual for any crime whereof the hiſtory, circumſtances, and excuſes, have not been ſubmitted to the royal wiſdom and conſideration.

Form of paſſing a remiſſion.

THE manner of ſuing out a pardon of old, ſeems to have been by a writ or ſignature under the King's hand, wherein, with conſent of his treaſurer and the other Lords of Exchequer, his Majeſty ordained a letter of remiſſion to be drawn up, and paſſed under the Great Seal. After being ſigned by his Majeſty, the ſignature was to be preſented in Exchequer, for the advice of that board, and towards taxing the aſſythment, where ſuch was due: And here, upon the ſhowing of ſufficient reaſons by any one having intereſt, the ſignature might be ſtopped in its progreſs to the ſeals, and be made the ſubject of a report to his Majeſty, ſetting forth the true ſituation of the caſe; towards which end, in caſes of pardon before trial, the Lords of Exchequer might themſelves take examination of witneſſes, or, if they ſaw cauſe for it, might remit to the Juſtice and his deputes to take a precognition, and report the reſult of their inquiry. This courſe was followed, in purſuance of the objections moved in Exchequer, to the remiſſion in favour of Hew Crawford, for the ſlaughter of George Wyllie. Sept. 9. 1663. And the King himſelf made the like remit to the Lords of Juſticiary, on the application of Catharine M'Millan for a pardon, as a ſecurity to her againſt the conſequences of a decree of improbation of a writing, in which ſhe had ſome concern. Mar. 5. 1677. If no objection were made in Exchequer, or none that deſerved regard, the ſignature next paſſed through

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through the ſeveral offices, in ordinary courſe, to the Great Seal; by affixing whereof it became complete and irretractible, on any pretence of miſinformation or obreption. Till then the writing was no remiſſion; as was found in the caſe of Strachan of Glenkindie, &c. whoſe letter was not allowed, as not having paſſed the Seals [1].

Nov. 27. 1676.

Form of paſſing a remiſſion.

In the practice of later times, theſe forms have been ſomewhat abridged. The letter of remiſſion, ſigned by his Majeſty, and bearing no advice or conſent, is tranſmitted, *per ſaltum*, from the Secretary of State's Office, to the Keeper of the Great Seal, in whoſe hands it thus receives its conſummation, without any farther warrant or inquiry. In this courſe of proceeding, the party's ſecurity of his aſſythment is therefore only thus: That when pleaded or preſented in Court (which, for aught that I can ſee, may be done in the abſence even of the perſon concerned) the pardon will only be allowed on its being ſhown that the private complainer has been ſatisfied, or on caution found to pay the aſſythment, as it ſhall afterwards be modified in the proper Court. For the moſt part, but always under a reſervation of their right to do this piece of buſineſs for themſelves, the Lords of Juſticiary have made a remit for this purpoſe to the Barons of Exchequer [2], in their deliverance

[1] "The Lords, in regaird the remiſſion produced is not paſſed the Sealls, they "therefore continue the dyet till Monday next, and ordaines the defenders to find "ſufficient caution for their appeirance the ſaid day."

[2] This was done in the caſe of Macneil, (July 21. 1717), who, however, lay in gaol till payment of the ſum taxed in Exchequer; in that of Samuel Mathews, (Nov. 13. 1721); of Sir Gilbert Elliot, (July 30. 1727); of Joſeph Hume, (Dec. 22. 1732); and of David Hume, (March 27. 1733). In Sir James Steuart's caſe, (March 3. 1740), the remit was to the Lords of Seſſion; as it alſo was in the caſe of Thomas Roy, June 24. 1760.

deliverance allowing the remiſſion to be received. After being allowed, it enters the record of Court; and the Lords addreſs the neceſſary order to the proper magiſtrate, for authoriſing him to deſiſt from execution of the ſentence. In a caſe of neceſſity, this ſeems to be one of thoſe acts, which lie within the province even of a ſingle Judge; as it is not to be imagined, that for want of a quorum of the Court, which cannot always be had, the royal mercy is to be diſappointed, and the life or perſon of a fellow creature to be thrown away; not to mention that this buſineſs is of ſo plain a nature, and one in which there is ſo little room for the exerciſe of judgment or diſcretion. I obſerve, accordingly, that in one inſtance, a ſingle Judge gives a deliverance ſiſting execution on a reſpite.

June 21. 1748. Caſe of John Pott.

A PARDON is either a free pardon, releaſing the convict from all the conſequences of his ſentence; or it may be burdened with ſome condition, ſuch as tranſportation to parts abroad, or ſerving his Majeſty in his fleet or army, or with a reſervation of all forfeitures and eſcheats accruing from the conviction. For as it is in his Majeſty's pleaſure, whether he will at all liſten to the application for mercy, ſo he may qualify his royal grace with ſuch terms as ſeem requiſite towards the public intereſt, or ſuitable to the juſtice of the caſe. Thus I find a pardon in the record to James Ogilvy, a perſon attainted of treaſon, which remits only "*omnes pœnas mortis et executionis quaſcunque, aut impriſonment "corporum vel corporis*," and thus ſeems not to remove the forfeiture, or the corruption of blood. It is no doubt in the convict's choice to accept the pardon as given, or ſubmit to execution of his ſentence; and therefore at ſiſting execution,

Pardon either free or conditional.

Jan. 1726.

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Nov. 22. and Dec. 1. 1750. William Martin. Dec. 13. and 20. 1750. Mugh Macghie.

tion, the Lords have ſometimes ordained the magiſtrate, keeper of the gaol, to receive and tranſmit to the clerk of Court, the felon's written acceptance of the pardon. And this indeed ſeems to be the right courſe; as well to ſhow that there was a true and a lawful cauſe for omitting to execute the ſentence, as to warrant the after proceedings againſt the convict, in caſe he ſhall break the condition of his pardon.

Remiſſions are before or after conviction.

REMISSIONS are of two ſorts in another point of view, being either before or after ſentence; and it is obvious that theſe cannot be alike as to their virtue, and the degree of benefit attending them. A remiſſion after ſentence, takes away the ſentence, and ſaves the convict from the pains, whatſoever, there ſet down for him; but it is far more doubtful, both in the nature of the thing [1] itſelf, and according to the tenor of any authorities we have on the ſubject, whether it takes away the conviction alſo, and relieves him from the ſtate of infamy following thereon, where the crime is of that kind which infers ſuch a conſequence in law. And if ſuch be the true conſtruction of our cuſtom, it may well be queſtioned, whether, even by the moſt expreſs and ample clauſe to the contrary, inſerted in a pardon, his Majeſty can make his bounty more ample, and diſpenſe with that intereſt which third parties may have, to exclude the teſtimony of ſuch diſhonourable perſons. Dallas, in his Syſtem of Styles, mentions, however,

Edit. 1697. p. 653.

[1] See ſtat. 2. Ro. I. c. 34. No. 1. Dirleton's Doubts, p. 224. *voce* Witneſſes, &c. Mackenzie's Criminals, Part ii. tit. 28. No. 4.

See alſo the opinions of the Judges on the objection to John Brown, in the printed trial of Smith and Brodie, in Auguſt 1788.

ever, that he had ſeen remiſſions in caſes of treaſon, which declare, "That the ſaid A. B. may alſo paſs upon inqueſts "and aſſizes, and be a habile witneſs in all writs and evi- "dents as fully and freely in all reſpects as before the ſaid "ſentence."

In regard again to a pardon before conviction, this does not reſtore or rehabilitate the perſon accuſed, but maintains him in all reſpects in his ſtate and condition, as at the time of the pardon. For, as Mackenzie obſerves, in betaking themſelves to this ſort of protection; "men redeem "themſelves rather from hazards than from guilt," ſo that they are to be eſteemed as perſons of entire fame and reputation.

Reſpite of execution.

The King, having power to pardon, enjoys alſo the lower power of reſpiting execution; and ſuch a delay his Majeſty may grant, either for a time certain, and named in his letter, or, indefinitely, till his farther pleaſure ſhall be notified. It is not, however, a very long time, ſince we firſt became acquainted with a reſpite in the latter of theſe forms. For I find in the record of the 1ſt of November 1750, a letter from our Judges to the Lords of the Regency at the time, wherein they mention, that they had received a reſpite *during his Majeſty's pleaſure*, for David Malloch and Hugh Macghie; and that in purſuance thereof, they had ſiſted execution till a diſtant day, the 9th of January then next, as having no example on record of any other form of ſiſt, and doubting their powers to give one *ſine die*, "as approaching too near "the confines of a pardon;" and therefore, they requeſt farther inſtructions in this matter, before the expiration of the aforeſaid term. Where the ſiſt is till a certain day only, it

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bears by common ſtyle, a new order for execution of the ſentence on that day, unleſs a farther fiſt ſhall be notified in the interval.

DURING the dependence of any application for pardon, and though a reſpite, or even more than one, have already been obtained, the convict muſt remain in gaol, to undergo his doom, in caſe he ſhall not in the end be relieved from it; and he cannot, even on offer of caution to return at the expiration of the fiſt, demand to be releaſed. So it was judged, on the application of John Lindſay, a priſoner under ſentence of fine, and of baniſhment for ſeven years, who, as his petition ſtates it, had obtained two ſucceſſive reſpites, each for a month, prohibiting the ſentence from being put to execution. This precedent is the more remarkable, as, beſide the pains above mentioned, Lindſay had been condemned alſo to three months' impriſonment; which part of the ſentence was thus, notwithſtanding the reſpite, in the daily courſe of execution. But, in the circumſtances of the caſe, it was proper to detain him, as a ſecurity for his undergoing the other and more ſevere part of his ſentence.

Mar. 21. 1791.

Nature of our writ of *reſpite* of old.

THERE was formerly known with us, under the name of reſpite *(reſpectuatio)*, another writ of favour and reprieve, which was not of ſo regular or ſo laudable a kind. This was a warrant under the Privy Seal, forbidding all trial of the favoured perſon for the crime there mentioned, during a certain ſpace of time; in which reſpect it was different from a pardon, and differed much for the worſe; in as much as by importunity and ſolicitation, this ſort of dilatory protection, leſs abſolute than a pardon in appearance, but equally effectual by renewal from time to time, was obtained in circumſtances

ſtances where there might have been ſome ſcruple of granting an open and immediate remiſſion. Speaking of this ſort of reſpite, the ſtatute 1483, c. 94. ſays accordingly, "that they are mair againſt juſtice than plaine remiſ-"ſions ar;" and therefore it forbids any ſuch to be given in all time to come. A later ſtatute, 1587, c. 80. prohibited in like manner, what was another means of accompliſhing the ſame object, the uſe of precepts under his Majeſty's hand, wherein he enjoined the Juſtice to continue the diet of libels depending before him, or to hold no farther proceedings upon them. Like many other good laws in our ſtatute-book, theſe ordinances met with very little regard in practice. Precepts of both kinds, continued to be obtained at the ſuit of the perſons accuſed; and to ſuch a length was this mockery of juſtice puſhed, that reſpites were known to be given at once, for a term of no fewer than nineteen years. There is this entry in the record of the 5th March 1565: "*Dictus Jacobus Bog cepit ſe ad reſpectuationem S. D. N. Regis* "*et Reginæ, pro arte et parte interfectionis quondam Georgii Ha-*"*milton, filii Willielmi Hamilton de in menſe Janii ultimo* "*elapſ. et ſubitò commiſſ. prout dicta reſpectuatio de data apud Edin.* "*22° die menſis Febr. &c. pro ſpatio novemdecem annorum ad-*"*huc duraturo.*" Alſo, on the 10th July 1599, Gavin Lockhart, accuſed of mutilation, produces a reſpite for nineteen years; but which fails of effect, having been ſtopped in its progreſs to the Seals. On the 13th of the ſame month, James Grahame, brother of Grahame of Fintry, indicted of ſlaughter, produces a reſpite for nineteen years; which is admitted, on his finding caution to ſatisfy the next of kin of the deceaſed. From the proceedings alſo in the caſe of Archibald Maxwell of Cowhill, it appears that this pannel had a reſpite as to a charge of ſlaughter, of which ſeveral years were ſtill

Aug. 6. 1605.

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to run. Theſe were grievous perverſions of juſtice; but, in one ſhape or other, they continued to be occaſionally practiſed, through the interference of the Scottiſh Privy Council, down to the period of the Revolution, when, along with ſeveral other abuſes of the like ſort, they were at laſt repreſſed. Yet it is to be noted, that the Claim of Right did not remonſtrate againſt ſuch continuations generally, but only againſt letters "ordaining the Judges to ſtop and deſiſt *ſine die*."

Protection by act of indemnity.

In our days, the only authority, other than a royal pardon, which can hinder from bringing any offender to trial, is that of the Légiſlature, interpoſed in what is called an act of indemnity, diſcharging the conſequences in law of all offences committed before a certain time. Of theſe ſtatutory protections, we have a few inſtances, ſuch as that at the Reſtoration, and that in 1708, and that in 1716, which paſſed on the ſuggeſtion of the Crown, after times of recent trouble and diſorder, or on other extraordinary occaſions, towards the eaſe of mens' minds, and for the quiet and ſettlement of the realm. What ſhall be the conſtruction of ſuch ſtatutes, with reſpect to the offences which they are to include, or the conſequences and dangers that are remitted in them, will depend on the terms in which they happen to be expreſſed. That in 1662 was drawn ſo liberally, as to relieve the offender from all private claim even of damages or reparation, equally as from the higher and public penalties of his wrong; having diſcharged "all action and queſtion, civil or criminal, and all damage, prejudice, or inconvenience whatſoever", to which he might be liable on that account. And this, though beyond the power of a royal pardon, is, however, a lawful thing to be done in Parliament; becauſe there all the lieges are repreſented, and have an opportunity of being heard on their reaſons why the act

1662, c. 10.
1708, c. 22.
1716, c. 19.

Conſtruction thereof.

act ſhould paſs in leſs favourable terms. As a thing, however, which may be prejudicial to the juſt claims of individuals, ſuch a purpoſe in the Legiſlature is not readily to be preſumed, and muſt be made evident in the words of the law. In ſeveral queſtions, therefore, which occurred under the act of indemnity 1708, though the accuſed was found to be ſafe as far as related to the intereſt of his Majeſty and the fiſk; yet ſtill the libel was found relevant to infer damages and expences to the perſon aggrieved; or, at leaſt, the abſolvitor was qualified with a reſervation of right to ſue for theſe in the proper Court. This was the tenor of the judgment in the caſe of James Stewart, June 20. 1709; and in that of Baſſet Eids and Richard Wood, Auguſt 4. 1709. The like conſtruction was applied to the ſtatute of 1716, in the caſe of Moffat and Robertſon, November 14. 1717; and in that of Sir William Bruce, 24th June 1718.

Conſtruction of acts of indemnity.

As far as concerns the public intereſt, a ſtatute of this kind is, however, to be conſtrued liberally for thoſe who may have need of ſuch a protection, and all exceptions from it ſtrictly. One of the moſt ordinary exceptions, has been that of *voluntary murder*, or, *ſlaughter of malice aforethought*. And upon ſuch a clauſe the queſtion has more than once ariſen, how the exception ſhould be conſtrued; whether according to the notions of the Engliſh lawyers, who probably had the drawing of thoſe ſtatutes, or according to the law of Scotland, which, in caſes of homicide, is not ſo favourable to the killer. Sometimes it has been argued, that, in ſtrict propriety, the conſtruction ought to be in the courts of each country, according to its own law and language: But it appears, that in this article our Judges have always leaned to the ſide of mercy; and, contrary to the conſtruction of thoſe terms in ordinary

Exception of wilful murder.

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ordinary caſes, have held that no murder is wilful or voluntary, but ſuch whereof the malice is truly deliberate, and of an older date than the laſt fatal meeting of the parties. Thus, in the caſe of James Shaw, the Court ſuſtained the pannel's plea on the act of indemnity, "in regard there is no quali-" fication of forethought felony libelled:" And yet, as related in the libel, this was a caſe of ſlaughter done by a ſoldier, upon a perſon with whom he was quartered, and for no provocation given by the deceaſed at the time, but ſome words of complaint as to the amount of the quartering-money. Again, after full debate, William Bruce of Auchinbowie, had the benefit of the indemnity allowed him, on his indictment for killing Elphinſton of Airth, in a caſual meeting and rencounter; though the libel bore the ordinary narrative of previous hatred and malice, but without mention of any ſpecial circumſtances to ſupport it. There are two precedents more of the like favourable character, that of Gilbert Kennedy, and that of Lindſay and Brock [1]. In Lindſay's caſe, however, as alſo in the later caſe of Samuel Mathews, inſtead of judging on the ſtory as related in the libel, the Court thought it better to have the fact eſtabliſhed by proof, and the verdict of an aſſize, and to refrain till then from deciding as to [2] the application of the ſtatute. In farther evidence

Aug. 1. 1709.

Nov. 28. and Dec. 5. 1709.

Jan. 23. and Feb. 21. and 27. 1710.

Nov. 15. 1717. Aug. 2. and 13. 1721.

Nov. 15. 16. and Dec. 16. 1717.

[1] The ſame point is argued at large in the caſe of Robert Baird *junior* of Saughtonhall, (Feb. 1711); but I have not been able to find that the debate was followed with any deciſion.

[2] "Repel the haill defences proponed for the pannel, excepting that defence "pled upon his Majeſty's gracious act of indemnity, concerning which, the ſaid "Lords ſuperſede to give their judgment, till the concluſion of the probation, "and return of the verdict thereupon."—Caſe of Lindſay.

In the caſe of Mathews, the jury found a ſpecial verdict; but he produced a pardon before the Court had occaſion to decide upon the act of indemnity.

evidence of this diſpoſition of our practice, notice may be taken of the judgment in the caſe of Janet Ferguſon, a perſon indicted of child-murder on the act 1690. "In reſpect of "her Majeſty's moſt gracious act of indemnity, wherein no "murders, but ſuch as are voluntary, are excepted; and that "her Majeſty's Solicitor declared he could only prove this "murder in the terms of the act of Parliament 1690, therefore "deſerted the diet of the criminal libel againſt the ſaid Janet "Ferguſon, pannel, and diſmiſs her from the bar." And the ſame doctrine was again applied in the ſimilar caſe of Marion Burnet [1]. But afterwards, on more mature conſideration, in the caſe of Ann Crawford, theſe precedents were departed from, and the libel, notwithſtanding the like plea, was remitted to an aſſize [2]. And, for my part, I think rightly: becauſe the act 1690 affects the manner of proof only, and nowiſe the quality of the offence of child-murder, which is neceſſarily of a malicious and premeditated nature.

July 11. 1709.

Aug. 1. 1709.

Dec. 2. 23. and 30. 1717.

II. THE only other way of preventing the execution of ſentence, is by reverſal of the judgment. Which may either take place by the ſupreme authority of an act of the Legiſlature, or upon review of the judgment in the ordinary courſe of law.

1. THE

[1] "In regaird that her Majeſty's Sollicitors declare, that they have no other "probation againſt the ſaid Marion Burnet, pannel, but the preſumptive proba-"tion by the act of Parliament 1690; therefore, ſuſtained her Majeſty's moſt "gracious act of indemnity."

[2] The record of this caſe is defective; for it does not bear either interlocutor of relevancy, proof, nor verdict: But it appears from the entry, Dec. 30., that the caſe went to an aſſize.

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Reverſal of ſentence by ſtatute, *ex juſtitia*. 1690, c. 16. 41.

1. THE ſtatute of reverſal of a ſentence, may either be *ex gratia*, on a narrative of favour and mercy; or *ex juſtitia*, on account of vices and irregularities in the trial, as that in 1690, in favour of Fletcher of Salton, and Swinton of Swinton, and ſeveral other perſons about the ſame time. When the reſtitution is on this laſt ground, every ſort of intereſt, public or private, which depends on the ſentence, is thereby at an end; not only any claim of damages or aſſythment at inſtance of a private complainer, but even all patrimonial rights ariſing to ſtrangers out of fines, confiſcations, or forfeitures, of which in the interval they have got poſſeſſion, under the warrant of gifts from the Crown. And for this reaſon it is, that thoſe ſpecial ſtatutes of reſtitution bear always in the end, that they are excepted from the general act of *ſalvo jure cujuſlibet*, which paſſes at the cloſe of every ſeſſion of Parliament; for in truth they are an impeachment *juris cujuſlibet*, as far as ſuch rights or intereſts are grounded in the judgment which is ſet aſide.

Reverſal by ſtatute, *ex gratia*.

ONE again who is reſtored *ex gratia* only, has not the ſame broad or high pretenſions; but muſt accept by way of favour and bounty, that which the ſtatute gives him, whatever it be, without any claim to the bygone profits of his property, or even for recovery of his tenements and effects themſelves, from thoſe who in the mean time, and by regular titles, have got right to them.

Reverſal of ſentence on review in courſe of law.

2. THE reverſal of judgment on review in courſe of law, has relation to the ſentences only of the inferior courts. For thoſe of the Court of Juſticiary are not ſubject to reviſal in any form of proceſs, either before themſelves or any other tribunal, not excepting even the Houſe of Lords, to which the

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Sentence of Juſticiary, if ſubject to review in Houſe of Lords. Aug. 1765.

the judgments of all the other courts of juſtice, of both Scotland and England, may be carried. As was likely to happen, this intereſting queſtion has more than once been the ſubject of diſcuſſion; and more eſpecially, it was ſo in the caſe of Lieutenant Ogilvie, who, after his conviction and ſentence, applied to his Majeſty for a reſpite, until he ſhould have an opportunity, (Parliament not being then aſſembled), of preſenting a petition of appeal. On this occaſion, a reſpite was granted accordingly, in the mean time; and a remit was made to the Attorney-General for England, and the Lord Advocate for Scotland, for their opinion as to the competency of ſuch review. And, on the part of the Lord Advocate, (at that time Mr Miller, afterwards ſucceſſively Lord Juſtice-Clerk, and Preſident of the Court of Seſſion), a report was made in the negative, upon theſe, as they have generally been eſteemed, and certainly to me appear, ſound and ſufficient grounds. 1. The abſolute ſilence of all our books and authorities in law, with reſpect to any ſuch right of appeal. 2. That there is no veſtige of any ſuch proceſs, either in the records of the preſent Court of Juſticiary, which was eſtabliſhed in 1671, nor in thoſe of Parliament, which begin with the reign of James I. 3. The ſilence of the Claim of Right on this head; though it aſſerts the privilege of proteſting for remead of law, againſt the judgments of the Lords of Seſſion, the Supreme Judicature in civil or patrimonial affairs. 4. That the treaty of Union confirmed the Court of Juſticiary in its conſtitution and privileges as they then ſtood; and that there has been no inſtance [1] ſince that time, of

1689, c. 13.

[1] The only exception is in a very ſingular and irregular caſe, that of George Innes, and others, magiſtrates of Elgin, indicted on 7th June 1712, for intruſion into

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of any ſuch appeal being received by the Houſe of Lords. The opinion of the Attorney-General for England, coincided with this

into the pariſh church of that place. Their defence was, that the place called the Little Kirk, of which they had taken poſſeſſion, was not properly a part of the pariſh kirk, but a building employed occaſionally for profane purpoſes. Inſtead of trying this pre-judicial queſtion themſelves, the Lords of Juſticiary, according to a faſhion ſometimes uſed in thoſe days, remitted it for trial in the Court of Seſſion, and recommended to that Court to diſcuſs it ſummarily, without abiding the courſe of any roll; and continued the diet of the criminal libel. The Lords of Seſſion found it proved, that the Little Kirk was part of the proper pariſh kirk. Whereupon, the criminal proceſs being again moved in (Feb. 9. 1713), the libel was remitted to an aſſize, who found a verdict againſt the pannels (Feb. 24.), which was followed with ſentence (March 2. 1713), for a fine of L. 20, and L. 30 of coſts. Meanwhile, the pannels had appealed to the Houſe of Lords, from the judgment of the Civil Court on the pre-judicial queſtion; and this they had pleaded, but without effect, as a reaſon for ſtaying proceedings in the criminal action. Therefore, at the cloſe of that trial, they entered an appeal againſt the ſentence of the Criminal Court, which depended on the other. In theſe circumſtances, where the reverſal of the civil decree neceſſarily involved that of the criminal ſentence, this laſt appeal alſo was received; and both judgments were reverſed in the Houſe of Lords, on the 3d July 1713. In conſequence, by order of the Court of Juſticiary, the coſts and damages awarded to the purſuers were repaid; Dec. 7. 1713. It is evident, that ſuch a caſe cannot be conſidered as a precedent in the queſtion.

I find, that at recording the ſentence in the caſe of Alexander Robertſon, and others, 2d Jan. 1718, the Solicitor-General "appealed to his Majeſty, and the "Houſe of Peers, for redreſs againſt the ſaid ſentence," and gave in his reaſons of appeal, which are entered in the record. In the caſe of Trotter of Mortonhall, and others, (Dec. 6. 1714), the pannels at paſſing ſentence, "They do therefore, "in virtue of the privilege competent to the ſubject, proteſt for remead of law to "the King and Parliament, and thereupon took inſtruments." The like proteſt at inſtance of William Houſton againſt George Kennedy, Feb. 27. and March 2. 1710. And again, the like (Feb. 23. 1713), at inſtance of Sir William Gordon, whoſe reaſons of appeal are recorded; as alſo, at inſtance of William Duguid, and others, Epiſcopal miniſters, Nov. 16. and 19. 1713; and, at inſtance of William Black, and others, July 23. 1714. But, as in none of theſe caſes was the proteſt followed with a petition of appeal, it can only be conſidered as an expreſſion of the diſſatisfaction of the party with the ſentence that had paſſed againſt him.

this report; and in conſequence, upon expiration of the reſpite, Lieutenant Ogilvie was executed, agreeably to his ſentence.

Appeal to Houſe of Lords if competent from ſentence of Juſticiary.

Mar. 7. 1768.

THE next attempt of this ſort, was in the trial of George Dempſter for bribery at an election; where the proſecutor offered a petition of appeal againſt the interlocutor of Court, ſuſtaining the pannel's privilege as a member of Parliament, in delay of trial. This was remitted to a committee, to report whether it ſhould be received; but the iſſue was, that inſtead of determining the general queſtion, the Houſe ſaw cauſe to pronounce *an order*, authoriſing the Court to reconſider their judgment[1], and proceed notwithſtanding the appeal. A ſecond appeal was entered in this caſe, after the interlocutor diſmiſſing the libel; but this was remitted to a committee, who never reported on the matter.

[1] See the words of this order in Maclaurin's Criminal Caſes, p. 417. There is alſo an entry relative to it in the Books of Adjournal, Aug. 16. 1768. The Lords of Juſticiary, in an interlocutor relative to this buſineſs, had inadvertently applied to this order, the term of *judgment*. The Lord Advocate, of the above date, repreſented to the Court, That he attended the committee of the Houſe of Lords, whoſe order of the 7th of March was made, "of purpoſe to avoid the determination of the queſtion as to the competency of an appeal from this Court;" and that he was apprehenſive, that afterwards, when the *res geſta* was forgotten, this interlocutor might be quoted as evidence of the receiving of the appeal, and of a *judgment* given on it in the Houſe of Lords. He therefore prayed to ſubſtitute the term *order* for that of *judgment*. The Court "declare, their having uſed "the term *judgment* in the above-mentioned interlocutor, proceeded from their "not adverting that there was any material difference betwixt the words *order* "and *judgment*, and they hereby declare, that they there intended no more by "the word *judgment*, than by that of *order*; and in reſpect of this declaration, "they find *no* occaſion to alter the former record."

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SOON afterwards, this queſtion was, however, carefully conſidered, as far at leaſt as relates to interlocutory orders, in the important caſe of Mungo Campbell; where an appeal was taken againſt the interlocutors of Court ſuſtaining their juriſdiction, and finding the libel relevant. Lord Mansfield, on this occaſion, entered fully into the ſeveral reaſons for refuſing ſuch appeals, eſpecially before the iſſue of the trial; and the petition was rejected accordingly.

Feb. 7. 1770.

Appeal to Houſe of Lords, if competent from ſentence of Juſticiary.

NEVERTHELESS, it was thought deſirable to bring this controverſy to a ſolemn and deciſive judgment, as relative to the caſe alſo of an appeal taken after conviction and ſentence. A petition was therefore offered for Alexander Murdiſon and John Miller, two perſons convicted of ſheep-ſtealing, and under ſentence of death. And this having been remitted to a committee, the Houſe of Lords determined on their report, "That the ſaid petition and appeal is not properly brought, "and that the ſame be and is hereby rejected."

Mar. 10. 1773.

Maclaurin, p. 581.

THAT judgment, in itſelf deciſive, has ſince been confirmed, with other two to the ſame purpoſe: One in the caſe of Bywater, in ſpring 1781, who complained of a deciſion repelling an objection in arreſt of judgment, and pronouncing ſentence of death; the other in the caſe of Robertſon and Berry, two perſons under ſentence of impriſonment, for printing and publiſhing a ſeditious libel. On the former of theſe occaſions, Lord Mansfield again entered at large into the hiſtory of this matter, and detailed the reaſons againſt receiving the petition: On the latter, it was attempted to be ſhown, that the other precedents, being all in trials for felony and capital crimes, were not deciſive of ſuch a caſe as this,

May 8. 1793.

this, where the ſentence was of impriſonment only, for what in England would be termed a miſdemeanour.

Appeal to Houſe of Lords, if competent from ſentence of Juſticiary.

AFTER detailing this ſeries of high authorities, may I preſume to add, in the cloſe of all, that in the courſe of my reſearches, which I have carried back to the oldeſt date of which we have any genuine record of the proceedings of the Juſticiar and his deputies, I have not met with any thing in the nature of an appeal to Parliament, beyond a mere proteſt that never was proſecuted, or which tends in anywiſe to ſhake that opinion of our ancient courſe of practice[1], on which the report of the Lord Advocate in the caſe of Ogilvie, and the judgments in the other caſes, are bottomed. It is true, there are a few inſtances of the Juſticiar and his deputies having gone to Parliament for inſtruction or advice: as in the caſe of Blair and Lawſon, where, on a ſupplication of the Juſtice-depute, the Eſtates of Parliament gave their opinion, that the puniſhment of forgery is death[2]. And again, in the trial of William Fraſer, where Alexander Colvill and James Robertſon, the two Juſtices-depute, delayed pronouncing doom in purſuance of a verdict for ſlaughter, and offered a petition to Parliament, praying to be adviſed how they ſhould proceed, in reſpect there was no direct proof, or judicial confeſſion, but *indicia* and preſumptions only: whereupon

Feb. *ult.* and June 6. 1650.

July 31. and Aug. 4. 1641.

[1] Mr Arnot, in a Note to p. 106. of his Collection of Criminal Caſes, delivers a poſitive opinion for the competency of appeals, and this he ſays, founded upon his ſearch into the Books of Adjournal from 1536, to the preſent times. But he has not directed the reader to the particular caſes or proceedings, which tend to the ſupport of his opinion.

[2] See the detail of the proceedings on that occaſion in Commentaries on Deſcription, &c. of Crimes, vol. i. p. 199.

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upon Parliament remitted to the Juſtices to proceed according to law; and the pannel in conſequence had ſentence of death. There is even one inſtance, of a caſe having been remitted by the Juſtice to Parliament, for trial; the caſe of John Gordon of Haddo and his ſervant, both of them indicted for the murder of John Stalker. On this occaſion, after ſome debate on the pannels' plea of an act of oblivion, the Lords of Privy Council ſaw cauſe to addreſs an act, or letter of advice to the Juſtice, ſuggeſting to him[1] to refer the caſe, as more proper for the cogniſance of his Majeſty and the Eſtates of Parliament. As generally happened on ſuch occaſions, the Juſtice liſtened to this piece of counſel; and hereupon, in July 1644, an act of forfeiture for treaſon paſſed againſt Haddo; and he ſuffered death accordingly.

June 25. and July 6. 1642.

It is alſo true, that for new and emergent reaſons, or on a change of the ruling intereſt, or of the courſe of public affairs, the Legiſlature often interpoſed to reſcind dooms of forfeiture, which had paſſed in the Court of the Juſticiar[2]; as the Privy Council

1 "They doe advyſe the Juſtice, and his deputis, to remit the advyſeing of "this proces to his Majeſtie, and the Eſtaittis of the next Parliament."

2 As in the caſe of Walter Scott of Branxholm, 15th March 1542: Of John, Lord Glamis, in the ſame Parliament: Of the Marquis of Montroſe, 8th Feb. 1661: Of the Laird of Largue, April 3. 1661: Of Macgilleſpick and Macdonald, May 22. 1661: Of the Earl of Forth, July 21. 1661: Of Harthill, Auguſt 7. 1662: Of Fletcher of Salton, June 30. 1690; and many others about that time, and of a later date. See the Records of Parliament.

There are alſo ſome inſtances of proceſs of forfeiture being remitted by Parliament to the Court of Juſticiary: Such as that againſt the Duke of Gordon, and the Earl of Seaforth, June 15. 1693; that againſt the Laird of Pitfoddles, July 5. 1695; that againſt rebels, July 22. 1690, purſued in but not yet forfeited by Parliament,

Council alſo were in uſe of granting reprieves, and commuting his dooms, or forbidding him to proceed to ſentence upon verdicts. But no concluſion can be drawn from thoſe acts of legiſlative authority, or thoſe inſtances of arbitrary and unwarrantable interference, which can be attributed only to the rude notions, and unſettled condition of the times: And it is ſtill true, that no traces are to be found of a proper appeal, or regular proceſs of review, by the Court of Parliament, for ſuſpending the ſentence, or ſtopping the proceedings of the Juſticiar, in the trial of ordinary crimes, or even of crimes againſt the State.

YET when I thus expreſs myſelf, I do not mean to affirm it as a certainty, that ſuch from the earlieſt times had been our plan of judicial eſtabliſhments in Scotland. In itſelf, it may ſeem not improbable, that like the ſimilar inſtitutions in ſome other countries of Europe, the Court of our Juſticiar was at firſt ſubordinate to the High Court of Parliament, or National Council, out of which the former may be ſuppoſed to have at firſt ariſen. But that this was truly the caſe, is not matter of evidence, but of conjecture only, and analogical inference, from the hiſtory of other countries; for the change, if there was one, had taken place before that period which is included in any of our records, or authentic monuments of judicial proceedings. And ſurely it will not bear a doubt, that by the total diſuſe of all ſuch review, and the uniform acquieſcence of the people for many centuries in the want of it, our judicial conſtitution was wrought at length

liament, and whoſe proceſs is declared to be as valid before the Juſticiary, upon the ſummons exhibited to Parliament, as if they had been ſummoned to the Court of Juſticiary in the firſt inſtance.

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length into another form, which cannot now be altered, or impeached. Neither is it difficult to underſtand, how the uſe of judging in ſuch matters, if it ever prevailed, ſhould early have been abandoned in ſuch an aſſembly as the Parliament of Scotland; which, by its ſhort and haſty ſittings, the ignorance and rudeneſs of its members, and their careleſſneſs of civil policy, was ſo little ſuited or diſpoſed regularly to officiate in a judicative capacity: Not to mention the urgent nature of criminal buſineſs, which could ſo ill bear the delay of this ſort of review; beſides, that in truth there was leſs need of ſuch a remedy in criminal caſes, where the ſubject had a ſafeguard in the form of his trial by jury, and in the recourſe which was always open to the grace and mercy of the Sovereign.

Sentence of Juſticiary not reducible in Court of Seſſion.

Practics, p. 182.

As the Court of Juſticiary are thus a ſovereign Court, conſidered with relation even to the Houſe of Lords, of courſe they are equally independent of all the other judicatures of the realm. It is true, Spottiſwood affirms, that their proceedings may be reduced in the Court of Seſſion, upon the ground of errors in law, or irregularity of proceſs. Sir Thomas Hope too, ſays, that the Lords of Seſſion may take cogniſance of all queſtions touching criminal juriſdiction. Nay, Mackenzie ſeems to doubt whether they may not reduce a decree of the Juſtices, if it be of a pure pecuniary nature; and he adds, that he had ſeen a reduction of the verdict of an inqueſt in a caſe of uſury, where the aſſize had erred *in calculo*. But on this paſſage Lord Royſton has noted, that what Mackenzie here calls a reduction, was not a ſentence, but a ſummons only of reduction; and in truth, (which Mackenzie himſelf has elſewhere taken notice of), as far back as 1684,

Major Practics, *tit.* Seſſion.

Part 2. tit. 8. No. 5.

Obſ. on Stat. p. 254. act 91.

1684, on occaſion of ſuch an attempt, though relative only to a decree finding that a bond of caution was forfeited, the Court of Seſſion declared that the Lords of Juſticiary were a Sovereign Court, and not ſubject to any ſuch challenge of their proceedings. This was on the 9th March 1684, in a proceſs at inſtance of Strachan of Glenkindie [1]. It will not bear a doubt, that even if this had not been true of the old Court of the Juſtice and his deputies, ſtill ſuch is the conſtitution and privilege of the preſent Court of Juſticiary; ſo that even their judgments ſuſtaining or diſowning their juriſdiction in any caſe, cannot be ſet aſide or reviewed by the authority of any other Judge.

Preſident Falconer's Deciſions, No. 90.

Lords of Juſticiary do not review their own ſentences.

LAST of all; for the ſame reaſons which hinder the receiving of any petition againſt an interlocutor even of the Lords of Juſticiary, that Court do not enjoy a power of reviewing, in any form of proceſs, their own ſentences and orders. And this is true, not only of ſuch as are pronounced by the whole Bench of Judges, or a quorum of their number, ſitting at Edinburgh, but equally ſo of the ſentence even of a ſingle Judge, given on his Circuit Ayre. Of this there was a remarkable inſtance in the caſe of William Wood, a perſon who had been tried for theft, before one of the Judges at Jedburgh, and had there been condemned to baniſhment, in purſuance of conviction on his own confeſſion of the charge. He

[1] It appears from the Records of Parliament, that Glenkindie endeavoured to get the better of this judgment, by offering a ſummons of reduction thereof to Parliament, (under authority of warrant from the Privy Council), and that inſtead of taking cogniſance thereof themſelves, Parliament, on the 17th July 1695, remitted the ſummons to the Court of Seſſion, to be ſummarily diſcuſſed by them, as they ſhould find juſt.

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He attempted, however, to bring the proceedings under review by ſuſpenſion, for this ſtrong and indeed concluſive reaſon, that the aſſize had made up their verdict without having incloſed, and after conſulting with the Court. But the Lords were of opinion, that neither in this nor in any other caſe, were they poſſeſſed of any ſuch power of review; and they therefore refuſed the bill[1]. On occaſion of ſuch emergencies, the remedy lies in an application for the royal mercy; which Wood accordingly made trial of with ſucceſs, having ſoon after received his Majeſty's free pardon of his offence.

Feb. 4. 1777.

Lords of Juſticiary their power of review.

As mentioned in the entry, the reverſal of judgment by proceſs of review, is applicable therefore to the judgments only of our other Courts of criminal juriſdiction; all of which, in the exerciſe of this branch of their powers, are ſubject to the control and ſuperintendence of the Lords of Juſticiary. And here I ſpeak without exception even of the ſentences of the High Court of Admiralty, though by ſtatute 1681, c. 16. it is declared to be "a Sovereign Judicature in itſelf, "and the High Admiral to be his Majeſty's Lieutenant and "Juſtice-General upon the ſeas, and to have the ſole juriſdic-"tion in all maritime and ſea-faring cauſes, foreign and do-"meſtic, whether civil or criminal, whatſoever, within this "realm." In the criminal, as in the civil department, this excluſive charter has been conſtrued as relating only to the trial of ſuch matters in the firſt inſtance, and the removal of them from the Court of the Judge-Admiral by advocation, and not as prohibitive of that natural and ſalutary power of reviſal, which is inherent in the Supreme Criminal Judicature of the

[1] "Having conſidered this bill, they refuſe the ſame as incompetent."

Oct. 3. Nov. 11. Dec. 5.

the kingdom. They judged, therefore, by ſuſpenſion, of the Admiral's ſentence in the noted caſe of Macadam and Long, in 1735; which was a trial for murder committed at ſea, on occaſion of a ſeizure of contraband goods. And they have done the like in later caſes of a ſtrict maritime nature; ſuch as the trial of Maciver and Maccallum, (July 1. and 15. 1784), for attempting to ſink an inſured ſhip, and thereby defraud the underwriters.

Review of ſentences of Seſſion in criminal caſes.

ONE exception, however, there is to this general power of review: I mean the exception of the Court of Seſſion; who, as far as either by ſtatute they have beſtowed on them, or by cuſtom or contingency they have acquired, a power of judging in criminal accuſations, are equally a ſupreme and an independent Court, as in the articles of their civil and ordinary buſineſs. That is to ſay, they are independent of the Court of Juſticiary: for certainly as to the right of appeal to the Houſe of Lords, there ſeems to be no room for diſtinguiſhing between their decrees of a patrimonial nature, and thoſe in caſes of perjury, forgery, falſehood, or other crimes of which they have the cogniſance. A petition of appeal was received, accordingly, againſt a ſentence for acceſſion to fraudulent bankruptcy, in the caſe of David Armſtrong. And in the caſe of James Carſe, a perſon declared infamous and condemned to the pillory by the Lords of Seſſion, for prevarication on oath as a witneſs in a proceſs depending there, the ſentence was, on appeal to the Houſe of Lords, reverſed, and ordered to be expunged from the books of ſederunt.

See Acts of Sederunt, Aug. 10. 1784.

Review of the decrees of inferior courts.

THERE are three forms of proceſs, in which the decrees of the inferior courts may be ſubmitted to the reviſal of the Lords of Juſticiary; namely, advocation, ſuſpenſion, and appeal.

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peal. For I have not obſerved, that there has been any inſtance of an attempt even at proceſs of reduction; and truly, there ſeems neither to be any need of that form of redreſs, nor is it very ſuitable to a court which has no ſtated or permanent terms of ſitting.

By proceſs of advocation. To what caſes applicable.

I. THE proceſs of advocation is now, in ſome reſpects, on a different footing from that on which it ſtood in the practice of former times. 1. As it is applied even after the trial has been terminated by ſentence in the inferior Court; inſtead of being uſed, as perhaps in ſtrictneſs it ought to be, for the correction of errors committed in the courſe only, and during the dependence of the trial. Sentence was reviewed in this form, in the caſe of William Brown, and that of Young and Wemyſs; both of them decided on the 19th March 1783. 2. According to what is ſaid in the more ancient authorities, and even in Stair and Mackenzie [1], the firſt deſtination of this remedy, was only to remove a proceſs from an incompetent, or a dilatory, or a partial and ſuſpected Judge, or at moſt in difficult and intricate caſes, and not to rectify the errors in point of law or form, which the Judge fell into in the trial. Now-a-days, when there is ſo much leſs room for jealouſy reſpecting the perſon of the Judge, or for controverſy as to the extent of his commiſſion, it is chiefly the latter object, of rectifying his errors, that gives occaſion to this ſort of complaint.

Form of the proceſs of advocation.

3. A CHANGE has taken place in the way and form of introducing the caſe into the Superior Court. This, of old, was not done by the authority of the Juſtice or his deputies, to whom in

[1] Stair, B. iv. tit. 37. No. 5.; Mackenzie, Part ii. tit. 17. No. 4.

in the end the trial of the matter at iſſue was to belong; but through the Lords of Privy Council, who had then a control of all proceedings in criminal matters, and afterwards through the Lords of Seſſion [1], as enjoying in thoſe days a ſituation of higher dignity, and a greater range of equitable powers, than the Juſtice. The manner of the proceſs ſeems to have been thus: That on a bill offered to the Lords of Privy Council, or of Council and Seſſion, an order was made and intimated, enjoining the inferior Judge not to proceed; and warrant was given for raiſing letters of advocation, under the Signet of the Privy Council, or of the Court of Seſſion, according as the bill had paſſed in the one court or the other. At raiſing ſuch letters, the complainer, if his crime were bailable, found caution in the Books of Adjournal (and this the letters bore *in gremio*) to compear with and inſiſt on them at a certain day, appointed for diſcuſſing his reaſons of complaint; and if he were in gaol at the time, warrant was given, in conſequence, to releaſe him. At the ſame time, he in virtue of the letters, gave a charge to the other party, the proſecutor in the original action, to appear at the diet named, and bring with him the proceedings; and to the ſame effect a charge was ſometimes given to the Judge alſo, and to the clerk of the inferior court. If again the crime were not bailable, the will of the letters bore a warrant for tranſmitting

[1] See Mackenzie, Part ii. tit. 17. No. 3.; Stair, Book iv. tit. 37. No. 5.; Dirleton's Doubts, *voce* Advocation. Theſe advocations are upon bill to the Privy Council; Heron and Cubbiſon, Aug. 10. 1666; Lord Hereis againſt John Logan, Feb. 5. 1667; John Macrae, Aug. 6. 1668; Thomas Ronald, Jan. 7. 1669.

Theſe are upon bill to the Court of Seſſion; Patrick Kincaid, Dec. 3. 1668; James Johnſton, Dec. 3. 1674; William Wilſon, Nov. 16. 1674; Robert Gordon, Dec. 8. 1675.

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mitting the advocator, under a ſure guard, to the place of trial. At the appointed diet, if the proſecutor appeared to ſupport his charge, the grounds of advocation were then diſcuſſed; and if he were abſent, at leaſt if he ſtill were ſo after a continuation of the diet, the cauſe was then removed from the court of the inferior judge; but ſtill under proviſion of the complainer finding caution to underlie the law before the Juſtice, at any time when he ſhould be lawfully charged to that effect. Theſe particulars appear from the entries in the following, among other proceſſes of advocation; that at inſtance of James Anderſon (June 4. 1669); John Heron and others (Auguſt 10. 1666); Lord Hereis againſt John Logan (February 5. 1667); Sir Charles Erſkine againſt Procurator-fiſcal of the Admiralty-Court (November 16. 1674); and Robert Gordon of Kilnotrie (December 8. 1675).

Form of the proceſs of advocation.

THIS courſe of application for relief, was attended with the obvious impropriety, of remitting to the civil Judge the cogniſance of queſtions in criminal law, and enabling him finally to decide ſuch controverſies, by refuſal of the bill of advocation. Nevertheleſs, as appears from ſome of the caſes above cited, this faſhion did not immediately go into diſuſe on the eſtabliſhment of the new Court of Juſticiary, though by their commiſſion in 1671 declared to be ſupreme and independent in their province. But, ſoon after the Revolution [1], this unſuitable interference of the Civil Court with the buſineſs of their brethren, was laid aſide; and the Lords of Juſticiary

[1] There are inſtances of bills of advocation, paſſed by the Lords of Juſticiary, as far back as 1693.

Juſticiary were put into the quiet and excluſive poſſeſſion of the right of paſſing bills of advocation for themſelves, in all caſes which fall properly within their charter.

Advocation applies to decrees of inferior courts.

As to the application of this form of redreſs; it ſeems to be univerſal, with exception only of the ſentences of the Court of Admiralty, with reſpect to which all advocation is forbidden, by the poſitive enactment of the ſtatute 1681, c. 16. It had long ago come to be extended to the ſentences even of thoſe Judges, ſuch as Lords of Regality, and heritable Juſticiars of particular diſtricts, who once pretended to a juriſdiction within their reſpective territories, as high and as ample as that of his Majeſty's own immediate Court. But, whatever in this article might once have been their condition, as with relation to the Juſticiar and his deputies, the caſe was materially altered (and hence the diſuſe of the right of *repledging*) on the eſtabliſhment of the new judicature in 1671; which was meant to enjoy the like control and ſupremacy in criminal, as the Court of Seſſion in civil buſineſs and affairs [1]. The trial of Carmichael for murder, was taken by advocation from the ſtewart of Annandale, or Lord of the regality of Moffat; as was that of William Farquhar, from Sinclair of Ulbſter, Juſticiar of Caithneſs; and this, on both occaſions, before ſentence, or even any material progreſs made in the trial. In the laſt of theſe caſes, the heritable Judge offered to paſs from his oppoſition to the removal of the proceſs, if his conſent were marked as the ground of judgment in the record; but the bill was paſſed *ſimpliciter* in ordinary form. The like

Nov. 22. 1699.

Feb. 13. 1721.

[1] See Stewart to that effect, in his Anſwers to Dirleton's Doubts, *voce* Advocation.

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Nov. 2. and 29. 1744.

like was done in the caſe of Donald and Hugh Chiſholm, who were proſecuted for murder, before the bailie of the regality of Lovat.

Preſent form of the proceſs of advocation.

In the modern practice, the form of a proceſs of advocation has been materially ſhortened from what it was of old: For it is not now ſo ordinary a thing, to expede the letters of advocation at all, but rather, by agreement of parties, to debate and finally diſcuſs the whole merits of the caſe on the bill itſelf; as is often done in the advocation of a civil proceſs. In this reſpect alſo, the civil and criminal proceſs of advocation are alike, that during the litigation on the bill, the proceedings are held without the perſonal preſence of either of the parties concerned. As indeed, if the offence be capital, and not bailable, it is not in the power of the pannel to give his attendance at this period; being confined in the gaol of the inferior juriſdiction, whence he cannot be removed but in virtue of a warrant of the Supreme Court.

Préſence of pannel not requiſite at diſcuſſing the bill. Notes, *ad p.* 220. Sept. 12. 1721.

Lord Royston has ſet it down, that this point was fixed on the 12th November 1722, at judging an advocation from the regality of Tarbolton. He takes notice too of an advocation from the bailie of Carrick, which paſſed in abſence of the complainer, Mary Mackenzie or Mackennay, who was a priſoner at the time in the gaol of Maybole, the head burgh of that bailiary [1]; and in the concluſion, he obſerves,

[1] I mention theſe precedents, and thoſe in the next paragraph, chiefly on his Lordſhip's authority: For it appears, that the cuſtom has not been uniform, as to the inſerting of theſe proceſſes of review in the record. Some of the proceedings in Mary Mackenzie's caſe are recorded, and others not.

ſerves, that in no caſe had the raiſer of the advocation been preſent at this period of the proceedings, ſince he was upon the Bench.

One Judge may paſs bill of advocation.

ANOTHER point in which the civil and criminal proceſs of advocation are alike is, that a ſingle Judge is competent to paſs the bill. To which effect an opinion was given by all the Judges, when conſulted by Lord Royſton, in an advocation from the Bailies of Edinburgh, at the inſtance of one Brownhill [1]; though in the circumſtances of that caſe, it was thought proper not to paſs the bill, but to remit the caſe with inſtructions. This point was, however, again brought in queſtion, in an advocation from the Bailies of Stirling, at inſtance of Captain Charles Campbell, and others; which having been paſſed by one only of the Judges, a petition was offered for the proſecutor Wingate, complaining of this irregularity (as it was ſaid to be) and inſiſting for the judgment of a quorum of the Court. But here the objection was repelled; and this the more eſpecially, as it appeared on a ſearch into precedents, that ſuch had been the practice of the Court, from the earlieſt period of its paſſing bills of advocation, in 1693. The ſame rule will not, however, apply to the diſcuſſing of the reaſons of advocation on the bill; which is an ultimate trial of the cauſe, and can only take place, therefore, before a quorum of the Court.

Mar. 22. 1722.

Royſton's Notes, *ad p.* 218.

Nov. 25. 1734.

Remit on the bill with inſtructions.

BESIDE ſimply paſſing or refuſing the bill, the Lords have it in their power to remit the proceſs to the inferior judge, with inſtructions how to proceed. As was done in Fraſer's

Apr. 4. 1729.

[1] This caſe is not in the record. Neither is that of the Bailies of Stirling.

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March 1722. adcocation from the Sheriff of Inverneſs, and in Brownhill's from the Bailies of Edinburgh[1]. There are precedents alſo of advocation, to the effect of trying the caſe in the next Circuit Court of Juſticiary for the diſtrict of counties where the proſecution ariſes. On the bill for William Macrae, advocation

July 3. 1711. was granted to the next Circuit Court to be holden at Glaſgow; and on that for Alexander Macpherſon and Margaret

Aug. 1. 1711. Small, to the next Circuit Court to be holden at Inverneſs[2]. After removal of the proceſs by paſſing the bill, the condition of things is thus far altered, that the preſence of both parties becomes equally neceſſary, as if the proſecution had been in the ſuperior Court from the beginning: They have therefore to find ſurety, *de novo;* the proſecutor, if a private party, to inſiſt, and the pannel, if not in cuſtody, for his appearance; ſince any caution which they may formerly have found, is no longer applicable to the ſituation of the proceſs. Indeed it is obvious, that wherever any caſe is advocated before ſwearing an aſſize, the firſt libel muſt neceſſarily periſh, and new letters be raiſed; becauſe neither aſſize nor witneſſes are bound to attend, but at the place to which at firſt they were ſummoned.

Proceſs of ſuſpenſion. Extent of its application.

II. THE remedy of ſuſpenſion, is that which applies after concluſion of the trial in the inferior court, to hinder execution of the ſentence. Like proceſs of advocation, it took place formerly under the warrant of a bill paſſed by the Lords

[1] Neither of theſe caſes appears in the record. They are mentioned in Royſton's Notes, *ad p.* 218.

[2] Theſe caſes are both in the record.

Lords of Seſſion [1]; in virtue whereof letters of ſuſpenſion were raiſed, calling the purſuer of the firſt libel to anſwer at a certain diet, and ſupport the ſentence he had obtained. And this courſe continued to be occaſionally made uſe of, not only after the new eſtabliſhment in 1671, but in much later times. At laſt, however, in 1729, on occaſion of a bill of ſuſpenſion which was offered to the Lords of Seſſion, of a ſentence of the Steward of Kirkcudbright proceeding on the verdict of an aſſize, that Judicature ſaw cauſe to correct this irregular interference, and refuſe the bill as incompetent; reſerving to the complainer his courſe of relief with the proper Court: In purſuance of which reſervation, a new bill was offered to the Lords of Juſticiary; who paſſed it, and afterwards ſuſpended *ſimpliciter* the judgment of the Steward.

Nov. 7. 1729. Macguffock againſt Macminn.

Jan. 12. 1730. Royſton's Notes, *ad p.* 221. *et p.* 195.

AFTER that time, this ſort of proceſs came into frequent and ordinary uſe, and does not ſeem to have been queſtioned in point of competency, except on the part of the Juſticiar of Argyle, and the Lords of Regality. Now, as to the former, his pretenſions to a ſupreme and independent authority within his bounds, truly reſted on very ſufficient grounds. For as the family of Argyle had been in poſſeſſion of the office of Juſtice-General for all Scotland, till 1628, and had qualified their reſignation of it at that time into the hands of Charles I., with an ample and anxious reſervation of their right, as far as related to the counties of Argyle and Tarbat, and the Weſtern Iſles; ſo this remnant of juriſdiction was plainly of the ſame high and ſovereign quality, though limited

Juſticiar of Argyle. Not ſubject to review.

1 "The Lords of Seſſion do ſuſpend the execution likewiſe of all ſentences in "the Juſtice Courts; but theſe ſuſpenſions, when once raiſed, are diſcuſſed before "the Juſtices." Mackenzie, Part ii. tit. 7. No. 6.

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mited in point of extent, as that broad and univerſal charter out of which it was reſerved. It was in virtue only of a ſpecial proviſion in the contract of reſignation, that his Majeſty was enabled to order the holding of a Juſtice Ayre, twice in the year, within the territory thus excepted; and even here, the King's Juſtices were to ſit and judge only along with the Earl of Argyle. The Juſtice-Clerk too, by the ſame contract (but this was altered by a ſtatute in 1633) was declared to be clerk of the Earl's Juſticiary Court; and by the charter of June 1633, which followed on that contract, the territory of Argyle and Tarbat was ordered to be reſerved out of all future commiſſions, to be granted by his Majeſty, of the office of Juſtice-General of the kingdom. Hence alſo, in 1693, 1695, and 1702, when parliamentary commiſſions iſſued for ſuppreſſing depredations in the Highlands, the bounds of this Juſticiary were excepted from them; and a proviſion was thrown into the ſeveral ſtatutes, for obliging the family of Argyle to authoriſe the King's commiſſioners with a ſpecial commiſſion for that diſtrict, in their name. Accordingly, in July 1709, James Stewart, Provoſt of Rothſay, and other Juſtices of Peace for the Iſle of Bute, having been proſecuted in the Court of Juſticiary, at inſtance of Daniel Macilherran, for oppreſſion; and the Duke of Argyle having put in his claim to the excluſive cogniſance of ſuch a trial; this, upon the Lord Advocate's report in favour of it, as founded in law, was allowed, and the pannels were remitted for trial by the Duke or his deputies. And again, on the 26th June 1738, on occaſion of a bill of ſuſpenſion at inſtance of John Campbell of Barwilline, who complained of a warrant of lawborrows, granted by the Juſticiar-depute of Argyle; the Lords, after conſidering a memorial for the Duke, ſuſtained his declinator of their juriſdiction of review, and

July 18. and 25. 1709.

on

on that ground refuſed the bill. Moreover, on the 4th October 1708, Janet Chalmers, accuſed of adultery in the Court of Juſticiary, was repledged by and given up to the Duke's Court. And on the 11th of October 1709, an act of adjournal paſſed on the Circuit at Glaſgow, excuſing the Sheriffs and freeholders of Argyle and Bute from attendance on the Judges, but for that Circuit only, in reſpect of their frequent ſervice and duty in the local courts of the Juſticiar of their bounds. In regard again to the Lords of Regality; they continued to claim an exemption, as of old, from all review of their proceedings, as having a royal and co-ordinate juriſdiction with that of the Lords of Juſticiary themſelves. In particular, this plea was urged for the Duke of Montroſe, Bailie of the Regality of Glaſgow, in the ſuſpenſion at inſtance of Gabriel Cunningham, a horſe-ſtealer, who had been tried and condemned to die, on a libel before the Bailie. In anſwer, the ſuſpender inſiſted on the neceſſity of this ſort of proceſs, to prevent the execution of an erroneous judgment; and on the nature alſo of the new eſtabliſhment in 1671, as plainly calculated to reduce all the local juriſdictions of the kingdom, how excluſive ſoever in the firſt inſtance, under this ſalutary control and ſuperintendence. Accordingly the declinature was repelled; and in the end (the priſoner having been tranſmitted to Edinburgh, to be perſonally ſiſted at diſcuſſing the ſuſpenſion) his ſentence of death was commuted for tranſportation.

Courts of Regality became liable to review.

Aug. 13. and 25. Nov. 7. 1730.

Royſton's Notes, *ad p.* 221.

In this, as in the other form of review, the powers of the Court belong to each of the Judges, not only as to granting a ſiſt, but the paſſing alſo of the bill, where this ſtep is not intended as a final diſcuſſion of the proceſs. In the caſe of Cunningham,

One Judge may paſs the bill.

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ham, the bill had been paſſed by the Lord Juſtice-Clerk alone; and Lord Dun had paſſed one in the caſe of Robert Lindſay againſt the Procurator for the Church, Nov. 12. 1714[1]. More lately, in Nov. 1774, in the caſe of Henry Macgraugh, who complained of an order given to ſcourge him, agreeably to the certification of his ſentence of baniſhment, Lord Pitfour alone had proceeded to paſs the bill; which act of his being complained of in a petition, and the procurator-fiſcal having agreed to paſs from the ſcourging, the Lords, in reſpect of that conſent, adhered to the interlocutor of Lord Pitfour.

Jan. 26. 1775.

Power to ſuſpend ſentence proceeding on verdict.

In judging of ſuſpenſions, the queſtion may ſometimes ariſe, concerning the power of the Court of Juſticiary to ſet aſide a ſentence which proceeds on the verdict of an aſſize. And here, juſt as in the caſe of a verdict returned in any trial before themſelves, there ſeems to be room for a diſtinction. If the verdict be challenged on this ground only, that it is not warranted by the evidence in the trial, certainly the Lords can pay no regard to ſuch a plea. To determine on the import and ſufficiency of the proof, is the peculiar province of every aſſize, in what Court ſoever the trial be; and in the proceſs of review, equally as in receiving a verdict from an aſſize named by themſelves, the Lords of Juſticiary muſt, in that reſpect, take the face of the verdict for their rule, and hold it to be the truth. This doctrine muſt, however, be received under one proviſion,—that the evidence laid before the aſſize be lawful evidence, and taken in a lawful manner. For if

[1] I mention theſe on the authority only of a liſt of caſes ſubjoined to the anſwers to the bill of *advocation*, in the caſe of Charles Campbell, and others, in November 1734.

if the inferior Judge have admitted material witneſſes, to whom lawful objections were propoſed; or have ſuffered depoſitions to be produced to the inqueſt, which were not taken in their preſence; or have improperly circumſcribed the pannel in his proof, or the like; theſe things ſhall certainly have their weight againſt the verdict. For in this, the ſuſpender does not impeach the concluſion which the aſſize have come to on the proof, ſuch as it was; but impeaches the ſkill and the proceedings of the Judge, who has not laid the lawful and proper materials before the aſſize, for enabling them to form a ſound judgment on the caſe. But if all be right on the part of the Judge, then, as already ſaid, can there be no inquiry concerning the ſufficiency of the evidence to warrant the deciſion which the inqueſt have given upon the charge.

Power to ſuſpend ſentence proceeding on verdict.

On the other ſide; as to all objections which appear on the face of the verdict, or by compariſon thereof with the libel, or interlocutor of relevancy, or which ariſe from the irregular conduct and proceedings of the aſſize themſelves; as little is it ſubject to any doubt, that the Lords will as freely conſider and give effect to theſe, as to the error in law of the inferior Judge, if he ſuſtain an irrelevant libel, or improperly proceed to trial without calling an aſſize. For, in taking cogniſance of pleas of this ſort, the Lords in nowiſe go out of their own province, or ſet up their own judgment againſt that of the aſſize on the matter of proof: They only inquire concerning the regularity of the proceedings of the aſſize, and the ſufficiency and conſequences in law of that which they have found; matters, of which the aſſize cannot arrogate the deciſion to themſelves. To mention but one example

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Maclaurin, No. 46.

example of a rule which is ſo obvious: In the caſe of Sanderſon, in July 1730, the verdict and ſentence were ſet aſide, for the fault of the aſſize, in having intercourſe with others after incloſure.

Siſt of execution on a bill of ſuſpenſion.

It is no hinderance of the ſuſpenſion of a ſentence, that it has already in part been carried into execution: It may ſtill be ſet aſide as to the remainder. If the time of execution be near at the firſt preſenting of the bill, a ſiſt will then be given (unleſs the bill be frivolous, and may be refuſed ſtraightway) until a certain day; and this will be accompanied with an order to tranſmit the original proceedings [1], as alſo with one to execute the ſentence on expiration of the ſiſt, unleſs ſome new deliverance ſhall in the mean time be intimated to the inferior Judge. In this courſe, accordingly,

April 1725. Campbell and Mackinnon were executed on the ſentence of a Sheriff for hameſucken, which they had brought under review by bill of ſuſpenſion [2]. If the ſentence be capital, the pannel remains in gaol in the mean time, during the diſcuſſion of his plea; or if his preſence become neceſſary, which is the caſe when the bill is paſſed and farther proceedings are to be held in the matter, he is then tranſmitted to the gaol of Edinburgh, by warrant of the ſuperior Court. Nay more, though the

[1] On the 5th March 1734, William Park complains by petition to the Lords of Juſticiary, againſt the clerk of the bailiary of Cunningham, for refuſing to give him an extract of a ſentence of that court, which he means to ſuſpend. The Lords ſiſted execution, ordained the clerk to give an extract, and the petitioner to remain in gaol in the mean time.

[2] This is mentioned on the authority of the informations in ſeveral later caſes which refer to it; for the proceedings are not in the record. It is alſo mentioned in Lord Royſton's Notes, *ad p.* 221.

the ſentence be not capital, but of tranſportation only, or ſcourging or other corporal pains; yet ſtill the convict muſt continue in gaol during the trial of his complaint, and cannot claim to be admitted, as of right, to the privilege of bail; which is not intended for this more urgent ſtate of peril, after conviction and ſentence, but for the previous ſtate of accuſation only, while the preſumption is ſtill in favour of the priſoner. It may ſeem, however, to be ſubject to more doubt, whether the like ſhall hold in the ſuſpenſion of, or an appeal from, a ſentence of impriſonment, which is in the courſe of execution daily, during the dependence of the proceſs; ſo that the complainer, it may be argued, is truly denied the benefit of the law, unleſs he be releaſed on finding ſurety, which may be fixed at the diſcretion of the Court, to return to gaol in caſe the ſentence ſhall be affirmed. This point was debated, but not determined, on the ſuſpenſion for Alexander Flight, in June 1767.

Review by appeal to Circuit Court. 20. Geo. II. c. 43.

III. The third and only other proceſs of review, is in the nature of an appeal, and was firſt introduced by the juriſdiction-act; which allows an appeal to be taken to the next Circuit Court of Juſticiary, againſt any final judgment of an inferior judge, not inferring death or demembration: the reaſons being lodged with the clerk of the inferior court, within ten days after the date of the ſentence; and the other party, or his procurator, being ſerved with a copy of them, at leaſt fifteen days before the time of holding the Circuit Court; and caution being found alſo at entering the appeal, to abide the judgment of the Circuit Court, and pay the coſts, if any ſhall be awarded. The determination of the Judge on the Circuit in ſuch appeals, is not ſubject to review; but in caſe of

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difficulty, he may remit the proceſs, with his grounds of doubt, for the conſideration of all his brethren of the Criminal Bench.

To ſome it has ſeemed queſtionable, whether the appeal authoriſed by the ſtatute may be taken at any time, how diſtant ſoever from the ordinary ſeaſon for holding the Circuit Courts, and to ſuch of the Judges, indefinitely, who ſhall next hold ſuch a Court for that diſtrict; or if it can only be taken to a Circuit Court actually at the time ordained to be holden, and to the Judges, *nominatim*, who have been appointed to hold it. Some argument took place on this head, but no deciſion [1], in the caſe of Duncan Macmillan againſt James Baird. The words of the ſtatute do not ſeem favourable to any ſuch diſtinction.

July 14. 1791.

THE right of complaint in this form, is open alike to either party; and the proſecutor, where it is he that appeals, may wiſh for ſecurity, by detention of the pannel's perſon, towards the inflicting of ſuch puniſhment, as the Court of Appeal ſhall order. A caſe of this ſort was decided in November 1762. On the proſecution of Alexander Stewart, a private party, and

[1] This was a complaint to the Court of Juſticiary, on the part of the appellant, who ſet forth, that notwithſtanding his appeal, (which was relative to his right as a ſoldier, to work within burgh in a certain craft) the magiſtrates of Glaſgow had proceeded in the cauſe, and diſregarded the appeal. In the anſwers, the reſpondents inſiſted on various objections to the *form* of the appeal, the incompetency of it in a caſe of that deſcription, and eſpecially on this, that no Circuit Court was approaching, or had even been appointed to be holden at the date of the appeal. The Lords diſmiſſed the complaint as groundleſs and incompetent. It is obvious, that if there was any thing wrong, the complaint, on account of it, fell to be made to the Judges on the next Circuit Ayre at Glaſgow, who were to be Judges in the appeal, if duly brought.

and the fiſcal of a Sheriff-court, ſentence had paſſed againſt James Corſar, for an aſſault, ordering him to be impriſoned for a month. Not being ſatisfied with this, the proſecutor made a claim in the form of appeal, for damages alſo and expences; and as the period of the priſoner's confinement had nearly expired, Stewart inſiſted for warrant to detain his perſon, till he ſhould find caution *de judicio ſiſti*, and alſo *judicatum ſolvi*, in the appeal. To the former effect, warrant was accordingly given, under a penalty of L. 50. And this in truth was remedy ſufficient in the caſe; becauſe, if the pannel ſhould perſonally appear in the appeal, and be found liable in damages and expences, the Lords might then take effectual order for ſecuring theſe by detention of his perſon, if they ſaw cauſe.

Nov. 10. and 17. 1762.

WITH this article, of proceſs of review, I naturally cloſe the preſent Inquiry into the law of Scotland reſpecting the Trial of Crimes.

END OF VOLUME SECOND.

APPENDIX.

No. I.

ADDITIONAL NOTES.

APP. No. I.

I THINK it proper to ſubjoin a note of ſome caſes of importance, which have been lately tried; ſome of them, ſince the text of the preſent work was printed, and all of them ſince the Firſt Part of theſe Commentaries, relative to the *Deſcription and Puniſhment of Crimes*, was publiſhed. I will refer the reader to thoſe paſſages in this or the former work, with which thoſe deciſions connect.—I alſo ſet down here, a few things which have been omitted in their proper places.

No. 1.

ON the 25th July 1799, Patrick Anderſon, officer of exciſe, was indicted at inſtance of his Majeſty's Advocate, for the *murder* of Philip Kennedy. As it appeared in evidence the fact was thus. The pannel, Anderſon, along with Leighton and Trail, alſo officers of the revenue, having learned that a cargo of ſpirits had been landed at Collieſton, a place within

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in their diſtrict, ſet out, late in a winter evening, to make a ſeizure thereof. Anderſon was armed with a cutlaſs, as was alſo one at leaſt of his companions. On their way to Collieſton, they fell in with three men, carrying ankers of gin; which, on ſeeing the officers, they threw down, and ran off. Theſe ankers were left upon the ground, under the charge of Trail. Anderſon and Leighton then advanced a little, and ſoon met with a party of from a dozen to a ſcore of perſons, but moſtly women, in like manner carrying ankers of gin. On the near approach of the officers, the women fell back and diſperſed; but Philip Kennedy, the deceaſed, and John Kennedy, his brother, advanced from among them, bearing bludgeons, againſt the officers, with the intention, as it appeared, of giving the women leiſure to retire, and carry off the ſpirits. They did not, however, either of them, ſtrike the officers with their bludgeons, nor do them any material injury in their perſons: But John Kennedy endeavoured to grapple with Anderſon, in which purpoſe he was prevented, and quickly diſabled, by a ſtroke or ſtrokes of his cutlaſs in the arm. Meanwhile, Philip Kennedy had grappled with Leighton, and thrown him violently to the ground into a hollow place; and having fallen or got above him, he there kept him faſt down, notwithſtanding his own efforts to diſengage himſelf, aſſiſted alſo by Trail, who, on being called to for aſſiſtance, had left his ſeizure, and come up to the ſpot. In this ſituation, Anderſon, having diſabled his antagoniſt, interpoſed to aſſiſt Leighton; and, with his cutlaſs, gave Philip Kennedy ſeveral cuts on the back of the head, as he lay above Leighton; of which wounds Kennedy died in the courſe of an hour. It farther appeared, that during this ſcuffle, which took place in the night, by moon-light, the officers

officers were moleſted by another man, Sangſter, one of the ſmuggling party, who threw ſtones at them from a diſtance. APP. No. I.

In theſe circumſtances, the jury were of opinion, that conſidering the nature of the officers' duty and ſervice, the time of night, the number of the ſmuggling party, the neceſſity of diſpatch and activity to ſecure the ſeizure, the haſte and trepidation incident to the ſituation, and the officers' ignorance of what farther violence might be prepared for them, the pannel was juſtifiable in uſing his arms to diſengage his brother officer, and proſecute the ſeizure. They found him *not guilty;* and the verdict had the approbation of the Court.—See Comment. Part i. vol. i. p. 321.

On the 27th and 28th January 1800, Griffith Williams was tried for murder, and convicted. He had cruelly and deliberately beaten a woman with a ſtaff, at intervals, ſo that ſhe died next day. The woman was a proſtitute, and, as it appeared, had made free with part of a ſum of money, which he had fooliſhly truſted her with the day before. He had declared to thoſe who were with him, ſhortly before the fact, his reſolution to beat her, "and to beat *her ſo as juſt to leave life* "*in her.*" He was executed in purſuance of his ſentence.—See Comment. Part i. vol. i. p. 395. No. 2.

On the Circuit Ayre at Glaſgow, in April 1800, Peter Walker was tried on a libel, which charged hameſucken, as alſo aſſault with intention to rob. The fact was thus. Colo- No. 3.

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nel Colquhoun was at his houſe of Roſs Lodge, in Dunbartonſhire, for the purpoſe of levying the rents of his brother's eſtate in that neighbourhood. The priſoner and an aſſociate, having learned that ſuch was his errand, and expecting a conſiderable booty, left their work, at the diſtance of a good many miles, and travelled to Roſs Lodge: where, with their faces blacked, and armed with bludgeons, as well as with piſtols in their pockets, they, at an early hour of the evening, entered the houſe, juſt as Colonel Colquhoun and two friends who were with him, had finiſhed ſupper. Inſtantly on entering, they knocked down a maid-ſervant, whom they met in the lobby; and then another maid-ſervant; and laſt of all a man-ſervant, whom they met at the parlour-door, retiring after ſupper. They then ruſhed into the parlour, and attacked the three perſons there; two of whom they alſo knocked down, but not the third, who defended himſelf with a chair, and was fortunate enough to make his eſcape by a window. In his abſence, the aſſailants faſtened the door of the houſe on the inſide, and broke into a cupboard, where they ſearched ineffectually for the money: They alſo again knocked down the man-ſervant, on his refuſal to inform them where the money was. In the end, they found it neceſſary to retire, without having attained their object, and carrying off no article whatſoever.

On this *ſpecies facti*, it was objected to the relevancy of the charge of hameſucken, that the aſſault here was not made, nor the houſe entered, for the ſatisfaction of perſonal enmity; but *lucri cauſâ* only, with the purpoſe of carrying off the money. But it was held by the Judges, the Lords Juſtice-Clerk and Methven, that, upon the whole circumſtances of the caſe, the charge of hameſucken was good; the aſſault having commenced

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menced instantly on entering the house, and the entrance taking place at an early hour of the evening, when the invaders knew that the family were up, and that the money was either upon or under the personal care and keeping of the persons invaded, so that otherwise than by an assault on them, and violence done to them, there could be no hope of securing the spoil: That there was thus, from the first, an entry of the house, with a deliberate, and of course malicious intention to assault, as well as to rob; whereby none of the characters of hamesucken was wanting: and if the assault was accompanied with a robbery or attempt to rob, the case was only so much the more atrocious.

THE Court found the libel relevant in both charges; and the pannel was convicted of both, and had sentence of death. —See Commentaries, Part I. vol. ii. p. 36.

No. 4. IN the Circuit Court at Perth, held by the Lords Dunsinnan and Cullen, 10th May 1800, William Menzies, a boy of eight years old, was indicted for theft, and Robert Menzies and Catharine Macallum, his father and mother, for resetting what he stole. For the boy, a plea of nonage was put in, in bar of trial. The Court repelled this plea, and remitted him to an assize.—See Part I. vol. i. p. 20. 21.

No. 5. IN the same trial, a judgment was given, which supplies me with an authority for what is said in this work, vol. ii. p. 257, 258., as far as relates to the case of an *undue and unnecessary*

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delay to incloſe on the part of the jury, after they have been ſent out of Court, from the preſence of the Judges and the pannel, to incloſe and find their verdict. The interlocutor ordaining the aſſize to incloſe had been ſigned; and they had left the Court-room accordingly. But on calling over their names, in their chamber, to incloſe them, it was found that one juryman was abſent; and after ſome ſpace of time, from a quarter to half an hour, ſpent in ſearch and inquiry, he was at length found at ſupper, ſomewhere in the town of Perth. The aſſize then incloſed and returned a verdict, finding two of the pannels guilty. But this, after debate, the Court annulled, and acquitted the pannels, as in the caſe of an infringement of the ſtatute 1587, c. 92. It was obvious, that it was the duty of the aſſize to incloſe, without undue delay after removal out of the Court-room, when they ceaſed to be under the inſpection of the Judges and the pannel: That if the aſſize failed to do ſo, owing to the fault of one of their own number, they muſt be held as incloſed, and under the operation therefore of the ſtatute 1587, which forbids all intercourſe with them, or any of them, after their paſſing out of judgment; and that the intercourſe thus held, both with the faulty perſon, and the reſt of the aſſize, was therefore fatal to the verdict.

On learning the objection, and before incloſing, the Advocate-depute had moved the Court to diſcharge this aſſize, and begin the trial anew. But this the Court juſtly refuſed to allow: for the pannel had already, by the irregular proceedings, got right to his abſolvitor under the ſtatute; and of this advantage he could not, in any way whatſoever, be deprived.

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No. 6.

In the ſame Circuit Court, the queſtion was determined, which is argued in p. 175. and the following pages of the firſt volume of theſe Commentaries, relative to the conſtruction of the ſtatute 1701, c. 6. The caſe was thus: John Macintoſh, priſoner in the gaol of Perth, had run his letters; and had been ſerved on the 14th of March, juſt at the expiration of the ſixty days, with a libel calling him to be tried at Edinburgh on the 14th of April. This libel, however, never was inſiſted in, nor even called. The man in the mean time remained in gaol: and on the 12th of April he was ſerved with a new libel, calling him for trial in the Circuit Court to be held at Perth on the 9th day of May, being the 116th day from the time of intimation. It was objected for him, that his trial ought to have been inſiſted in under the firſt libel; at leaſt that the proſecutor could not have allowance for concluding the trial, of more than forty days following the ſixty; ſo that the man had now right to his abſolvitor, in terms of the ſtatute. The Court overruled this objection, and found that the trial might proceed; which it accordingly did. In this caſe, it was alſo pleaded, that the firſt libel had only been ſerved on the ſixty-firſt day, counting the day of intimation as one. The Court found that *it* was not to be counted,—that the days were to be free days.

No. 7.

In addition to the precedents which are cited in Part II. c. 6. of theſe Commentaries, relative to the power of inferior Judges to try without jury, notice may be taken of the following. David Gibſon, for preſenting to the keeper of the gaol of Glaſgow a falſe warrant of liberation, had been ſentenced by the magiſtrates of that burgh, to ſtand expoſed, bareheaded, for

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an hour, on the ſtairs of the court-room, with a label on his breaſt, bearing his offence in large characters, and to be baniſhed from the burgh for the term of three years. On complaint of this ſentence by bill of ſuſpenſion, which inſiſted, among other topics, on the want of a jury, the Lords of Juſticiary, (25th March 1790), ſuſpended the ſentence, *except* as to one year's *baniſhment* only.

No. 8.

THE Juſtices of the Peace for the county of Clackmannan, had, upon ſummary trial before themſelves, condemned Janet Clark, for ſtealing iron, to ſtand on the pillory, and to be drummed through the town of Alloa, and baniſhed the county (under certification of whipping) for the ſpace of three years. Of this ſentence ſhe complained in the Court of Seſſion, by bill of ſuſpenſion, chiefly on two grounds, the want of a jury, and the time fixed for her ſtanding on the pillory, being within the period of twelve days, as limited in the ſtatute 3. Geo. II. c. 32. The laſt was a clear ground of ſuſpenſion. But ſome of the Judges expreſſed doubts concerning the power of the Juſtices of the Peace to condemn to the pillory, as a ſpecies of *corporal puniſhment*, without the aſſiſtance of a jury. The bill of ſuſpenſion was paſſed 22d May 1800. This caſe is a farther inſtance of the power of the Lords of Seſſion to review ſuch ſentences of the inferior courts.—See Part II. vol. i. p. 114.

No. 9.

IN addition to what is ſaid in Part II. vol. ii. p. 21. of theſe Commentaries, as to the proper courſe of proceeding in an application

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application for bail, at inſtance of one who has been outlawed, notice may be taken of the petition of William Rennie, 11th July 1781, which prays for relaxation and bail, as follows: " May it therefore pleaſe your Lordſhips, to re-
" call the ſentence of fugitation, paſſed in abſence againſt the
" petitioner, and *thereafter*, to take cognition of the nature of
" the fact with which the petitioner was charged, and admit
" him to bail." Hereupon, " The Lords, &c. having con-
" ſidered the foregoing petition, with the petitioner's appear-
" ance in Court; they repone him againſt the ſentence of
" fugitation, and grant warrant for letters of relaxation at
" his inſtance; find that the petitioner may be admitted to
" bail, and in this caſe modify," &c.

No. 10.

THE doubts which I have ventured to expreſs in vol. ii. of theſe Commentaries, p. 284., with reſpect to the caſe of Hall, and in p. 280. and the following pages, with reſpect to omiſſions or errors in the preamble of a verdict, have been materially ſtrengthened by the judgment given on the 30th May 1800, on the verdict in the caſe of Bell, Black, and Fletcher. Theſe were the circumſtances of the caſe. George Bell *junior*, Archibald Black, (deſigned ſervant to *James Graham*), and *John Fletcher*, were called to take their trial for riot, in the Circuit Court at Glaſgow, in ſpring 1800. Black and Fletcher pleaded guilty: Bell pleaded not guilty. A proof was taken as to Bell; and a verdict was returned againſt all the three pannels as follows: " Having conſidered the libel raiſed and
" purſued at the inſtance of his Majeſty's Advocate, for his
" Majeſty's intereſt, againſt George Bell *junior*, Archibald
" Black, and *James Graham*, pannels, the interlocutor of re-
" levancy

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"levancy thereon pronounced by the Court, the confeſſion "of Archibald Black, and *John Fletcher*, and other evidence "adduced in proof of the libel, and the evidence in exculpa-"tion; they all in one voice find *the libel proven.* In witneſs "whereof," &c.

HEREUPON an objection was ſtated—that the libel ſpecified in the preamble of the verdict was not the libel in the record, upon which the trial had truly taken place, but a libel againſt different perſons; and that as by the terms of the verdict, the crime found proven againſt the pannels was not ſpecified therein, but only by reference to the libel; ſo this error, though formally in the preamble only, was truly in the ſubſtance of the verdict, and could not be corrected. Before diſmiſſing the aſſize, the Judges thought it proper, however, to interrogate the jury; who were unanimous in teſtifying that the libel on which they incloſed, and which alone they conſidered, was the libel in the record againſt Bell, Black, and Fletcher, and that the three perſons at the bar were the pannels to whom their verdict related. They explained alſo, that the error was owing to the clerk of Court, who had inſerted the wrong name in the form of the preamble, which he left with them at incloſing. The verdict was corrected in Court accordingly; and the queſtion was remitted for the opinion of all the Judges of the Criminal Bench; who, after hearing parties at large, and on mature deliberation, unanimouſly repelled the objection.

No. II.

No. II.

RULES[1] to be observed in taking Precognitions and making Presentments for Trial of Crimes before the Circuit Courts. APP. No. II.

I. WHERE any person is wounded, let physicians and surgeons be immediately ordered to inspect the wound, and judge and make a report of its cause, nature, and probable consequences.

II. IF, from the report of persons of skill, there is any appearance that the wound is dangerous, the declaration of the wounded person must be taken before credible witnesses, called to hear his declaration, and to be witnesses both of its being read over to him, and of his signing it, if he is able to sign it.

III. WHERE any dead body is found with the appearance of violence upon it; or where any person dies, and is suspected to have died by violence; the dead body must be opened, and also the head, and a report made of the cause of the death of the person, by physicians and surgeons.

IV. Where the dead body of a new-born child is found, that the usual experiment, by dropping the lungs in water, be tried,

[1] *N. B.* These rules were drawn out in 1765, by the agent for the Crown, and the depute-clerk of the Court of Justiciary, and were revised by Lord Hailes.

APP. No. II.

tried, to know if it has breathed. The condition of the body of the child muſt alſo be inſpected; whether it is to the full time: whether it has hair, and nails on the fingers and toes: Whether the navel-ſtring has been tied: and whether any, and what, marks of violence appear on the body of the child.

V. THAT when a murder is committed, as ſoon as it comes to the knowledge of the judge-ordinary, he and the clerk ſhould repair immediately to the place where it is ſaid to have been committed, and take a precognition of what appears at that place, as of the marks or impreſſions of feet upon the ground, the blood, or other particulars which may appear there, and of the whole other circumſtances which may aſcertain the crime, and point out the guilty perſon.

VI. WHEN a ſuſpicion ariſes that a perſon has been guilty either of wounding or killing another, warrants muſt be iſſued and executed for apprehending him: his perſon, houſe and repoſitories muſt be carefully ſearched for bloody clothes, ſword, or other weapon, by which the wound may have been given; and the condition of the things ſo found to be as ſpecially and particularly deſcribed, as the nature of them will admit, by the declarations of the witneſſes preſent; and to be aſcertained, where that can be done, by labels affixed thereto, with a writing thereon, relative to the declarations of the delinquent or witneſſes, ſubſcribed by them and the Judge, and to be lodged in ſafe cuſtody with perſons who can appear on the trial as witneſſes, and ſwear to their continuing in their cuſtody, with theſe marks, till the time of the trial.

VII.

VII. THE ſame rule to be obſerved as to other crimes, and the pieces of writing, inſtruments of committing the delict, goods ſtole, &c. ſo found, to be marked and lodged as above.

VIII. WHENEVER a perſon is taken up as a delinquent, let his declaration be inſtantly taken; and, in the declaration, let mention be made of the age of the delinquent, place, pariſh, and ſhire, in which the crime is ſaid to have been committed: Let the declaration be wrote on a ſheet of paper diſtinct from the reſt of the precognition, and be ſigned by the judge and declarant, if he can write, on each page; and, if he cannot, by the Judge alone, the declaration bearing, that the declarant cannot write. That, in the end of the declarations of delinquents, mention be made by whom it is written, and of at leaſt three credible witneſſes preſent at emitting the delaration, each of whom ſhould alſo ſign as witneſs to the declaration.

IX. IN ſearching the body of a woman ſuſpected of having brought forth a child, her breaſts and body muſt be examined by ſkilled perſons, upon the warrant of a Judge or Magiſtrate. And her declaration muſt alſo be taken in manner before directed.

X. WHERE any perſon ſupected of a crime, abſconds, flies, or eſcapes from juſtice, his deſcription muſt be forthwith drawn up, forwarded to the magiſtrates of the neareſt towns, and eſpecially to the principal magiſtrate or officer of the law, at the ſea-ports neareſt adjacent, with a requeſt for their aſſiſtance to apprehend the criminal. A like de-

APP. No. III.

ſcription to be forwarded to Edinburgh to the Crown-agent, that it may be put in the newſpapers.

XI. THAT particular care be taken to give all deſignations, by the place of abode, pariſh and ſhire of each witneſs, delinquent, and party, againſt whom the delict is committed; and that no perſon be deſigned in general *in ſuch a place*, but his particular occupation muſt be expreſſed; and if he can be deſigned by no particular occupation, that at leaſt he be deſigned as ſon to ſuch an one. The age of the witneſs ſhould alſo be taken down.

XII. THAT great care be taken to ſpecify, as nearly as poſſible, the particular time when the delict was committed.

XIII. THAT, as ſoon as a precognition is finiſhed upon any crime proper to be tried before the Circuit Court, a full copy of the precognition be tranſmitted to the agent of the Crown at Edinburgh, in order that the King's counſel may be timouſly appriſed of the caſe, and be prepared to draw the indictment whenever the preſentment is afterwards tranſmitted. And, where matter of doubt occurs in the courſe of taking a precognition, that a copy of the precognition, ſo far as it is taken, with the matter of doubt, be likewiſe tranſmitted to the agent of the Crown, in order to be adviſed by the King's counſel, if neceſſary.

XIV. THAT in all caſes, where any precognition has been ſo taken, preſentments be made in proper form, agreeable to the directions of the act of the 8th of Queen *Anne*, c. 14., (hereto ſubjoined), ſtating the crime committed, with all its circumſtances of time, place, and manner of committing

mitting it, and finding the delict a relevant point of dittay, with the liſt of witneſſes proper for proving the crime, and the delinquent's declaration; and that ſuch preſentments be ſent by the firſt poſt to Edinburgh.

XV. When, between the time of ſending up the preſentments, and the time of the Circuit, any of the witneſſes change their place of reſidence, that notice thereof be immediately tranſmitted to Edinburgh.

XVI. When the preſentment is made from one county, and any of the witneſſes live in another, that this be diſtinctly marked in the liſt of witneſſes annexed to the preſentment.

XVII. That the liſts of aſſize be taken regularly in their courſe through the ſhire, without favour and reſpect to gentlemen and others fit to paſs upon aſſizes; and that ſuch a number of landed gentlemen, be always returned as may ſerve for a ſpecial jury; and that theſe liſts be regularly tranſmitted with the preſentments.

XVIII. That the declarations of delinquents, preſentments, liſts of witneſſes, and liſts of aſſizers, be written with diſtinct hands, to prevent miſtakes, which, from bad writing, are very apt to happen in proper names and names of places.

XIX. If, by any accident the porteous roll or criminal letters ſhall not arrive within ſuch time as that they can be executed fifteen free days between the day of executing and the day of compearance, in that caſe, it is to no pur-

APP. No. H.

poſe to execute the indictment or criminal letters; and immediate notice ſhould be given to the agent for the Crown of their not being executed, and of the reaſon.

XX. THAT all letters in relation to delinquents, or the matter of theſe inſtructions, be ſent by poſt, directed to the agent for the Crown at Edinburgh.

FORM of an INFORMATION and PRESENTMENT.

Unto the Sheriff depute or Subſtitute of the Shire of

The INFORMATION and PRESENTMENT of A. B. Procurator-fiſcal of the ſaid Shire;

Humbly Sheweth,

THAT, upon the firſt day of February laſt, One thouſand ſeven hundred and eighty-ſix years, or upon one or other of the days of that month, or of the month of January immediately preceding, or of February immediately following, C. D. merchant in the burgh of C. in the pariſh of F. and ſhire of G. having conceived a deadly malice and ill-will againſt the now deceaſed H. J. merchant in the ſaid burgh of C., did aſſault the ſaid H. J. within the dwelling-houſe of L. M., vintner in the ſaid burgh; and, with a drawn ſword, or other lethal weapon, did wound him in the body, of which wound he, within two days, or ſome ſhort ſpace, died, and

and was thereby moſt cruelly bereaved of life and murdered: AT LEAST, time and place foreſaid, the ſaid H. J. was aſſaulted and wounded with a ſword, or other lethal weapon, of which wound he ſoon thereafter died, and was thereby murdered; and the ſaid C. D. complained upon, is guilty actor, or art and part, of the murder foreſaid.

May it therefore pleaſe your Lordſhip, to find the foreſaid information and preſentment a relevant point of dittay, and to tranſmit the ſame, with the liſt of witneſſes hereto ſubjoined, and precognition relative thereto, to the Lord Juſtice-Clerk or his deputes, that the ſame may be ingroſſed in the porteous roll for the ſhire of for the enſuing Circuit Court of Juſticiary, to be held at in the month of next.

(Signed) A. B. *Procurator-fiſcal.*

LIST of Witneſſes for proving the foregoing Information.

This Liſt alſo to be ſigned by the Procurator-fiſcal.

FORM of the Deliverance by the Sheriff.

AT the day of
One thouſand ſeven hundred and eighty-ſix years.—The Sheriff-depute having conſidered the foregoing information and preſentment, finds the ſame a relevant point of dittay, and ordains the clerk of Court to tranſmit the ſame, with the liſt of

APP. No. II. of witneſſes and precognition relative thereto, to the Lord Juſtice-Clerk or his deputes, for the purpoſe above mentioned.

Nota. The ſame form to be obſerved in preſentments from Magiſtrates of royal boroughs, or Juſtices of Peace.

No. III.

APP. No. III. SENTENCE of JUSTICIARY, changing the puniſhment of Death to Perpetual Servitude.

COPY of the Gift DONALD MACDONALD, as a perpetual Servant. From the original Extract in the Duke of Athole's Charter-houſe.

At Perth, the 5th day of December 1701.

THE Commiſſioners of Juſticiary of the North Diſtrict, for ſecuring the peace of the Highlands, conſidering that David Robertſon, Alexander Robertſon, *Alexander Stewart*, and *Donald Macdonald*, priſoners within the tolbooth of Perth, and indicted and tried at this Court, and by verdict of the inqueſt returned guilty of death, and that the Commiſſioners have changed their puniſhment of death to perpetual ſervitude; and that the ſaid pannels are at the Court's diſpoſal.

THEREFORE, the ſaid Commiſſioners have given and gifted, and hereby give and gift, the ſaid Donald Macdonald, one of the ſaid priſoners, as perpetual ſervant to the Right Honourable

nourable John Earl of Tullibardine, recommending to his Lordſhip to cauſe provide an collar of braſs, iron, or copper, which, by his ſentence or doom, whereof an extract is delivered to the magiſtrates of the ſaid burgh of Perth, is to lie upon his neck with this inſcription; DONALD MACDONALD, FOUND GUILTY OF DEATH FOR THEFT AT PERTH, DECEMBER 1701, AND GIFTED AS A PERPETUAL SERVANT TO JOHN, EARL OF TULLIBARDINE; and recommending alſo to his Lordſhip, to tranſport him from the ſaid priſon once the next week; and the ſaid Commiſſioners have ordained, and hereby ordain, the Magiſtrates of Perth, and keeper of their tolbooth, to deliver the ſaid Donald Macdonald to the ſaid Earl of Tullibardine, having the ſaid collar and inſcription, conform to the ſaid ſentence and doom.

EXTRACTED from the Books of Adjournal of the ſaid diſtrict, by me James Taylor, writer to his Majeſty's Signet, clerk of Court.

(Sic ſub.) JA. TAYLOR, Clk.

IN the Muſeum of the Society of Scottiſh Antiquaries, there is preſerved a braſs collar, with this inſcription: "ALEXANDER STEWART FOUND GUILTY OF DEATH FOR THEFT, AT PERTH, 5TH DECEMBER 1701; AND GIFTED BY THE JUSTICIARS AS A PERPETUAL SERVANT TO SIR JOHN ERSKINE OF ALVA." Alexander Stewart, the bearer of this collar, appears to have been the ſame perſon who is mentioned in the ſentence above ſet forth.

No. IV.

No. IV.

APP. No. IV.

COPY of a LEAGUE or BAND betwixt JOHN BUCHANAN of Arnprier, and Colonel MACGRIGOR in Glengyle, (father of the celebrated Robert Roy Macgrigor), from the Original in poſſeſſion of J. Buchanan, Eſq; of Auchleſſie.

At Buchanan and Glengyle, the twenty-third and twenty-fourth days of May 1693 *yeires.*

WE Lieutenant-Colonel Macgrigor in Glengyle, and John Buchanan of Arnpryor, conſidering, that it is agreeable to the laws of God, and alſo to the laws of this kingdome, that all perſones, eſpeciallie ſuch who are friends and relationes, ſhould live together chriſtianly in friendſhip, and in peace; and conſidering alſo that our predeceſſoures have been joynd together by allayances and relationes, and have enterteand an entire freandſhip together; and we being willing to continue the ſame keindneſs and freandſhip hereafter amongſt ourſelves, and thoſe deſcended of our families; therefor, I the ſaid Lieutenant-Colonel Macgrigor, for myſelf, and for all thoſe deſcended of my familie, commonly called *Clan Dual Chire*, and I the ſaid John Buchanan of Arnpryor, for myſelf, and for all thoſe deſcended of my family of *Mochaſter*, doe faithfully promiſe to obſerve and keep the following articles, in ſo far as they are agreeable to our duties as good Chriſtians, and conſiſtent with the obligationes that lie upon us to give obedience to the knowne laws of this kingdome.

IN

IN the *firſt* place, We do ſincerely promiſſe and engadge that we will live peaceably and orderly, and that we will do nothing that may diſquiet the public peace of the kingdome.

2*do*, THAT we ſhal keepe ane entire amiety and good correſpondence amongſt ourſelves, in ſo far as is agreeable to ane ſinceare friendſhipe and honeſt converſatione.

3*tio*, THAT we ſhall not doe any wrong or prejudice, any one of us to ane uther, or to our tenantes or ſervaintes, aither in perſones, goods, gear or effects, and that we will no ſuffer uthers to do the ſame without order of law, in ſo far as we can hinder it.

4*to*, THAT each of us ſhall, in a lawful manner, maintain and defend one ane uther, our tenants and ſervants, in perſones, and in goods, gear and effects, againſt all thoſe that will injure us, when aither of us ſhall be required to do this, an that upon the charges and expences of the perſone or perſones who ſhall require it.

5*to*, THAT each of us ſhall, with our beſt counſel and adviſſe, aſſiſt one ane uther in every lawful manner, that may tend for our peace, ſecurity and advantage.

6*to*, IN caſe any difference ſhall happen to fall out amongſt any of us, that we ſhall endeavour to cauſe them ſubmit and referre the ſame to the determinatione of two honeſt judiciouſe men, one of each ſirname, with power to them, in caſe of difference, to choiſe an juditious honeſt gentleman, to be overſman.

APP. No. IV.

Laſtly, We do declare, that it is not our intentione, hereby, to enter into any unwarrantable league, bond, or combinacione, qlk are diſcharged by the laws of this realme, but that we ſhould leive in an entire freindſhip and good correſpondance amongeſt ourſelves, for the maintainence, defence and protectione of our perſons, goods and effects, conform to the laws of God, and ſtatutes of this kingdome.

Signed { J. Buchanan. / Jo. Macgrigor.

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N. B. In this Index, when the Firſt Volume is meant, the Page only is marked: when the Second Volume is meant, it is marked thus, II. *or by a reference thus,* ib. *and the Page is added.*

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